TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 236 90.

JOHN J. WALSH, PLAINTIFF IN ERROR,

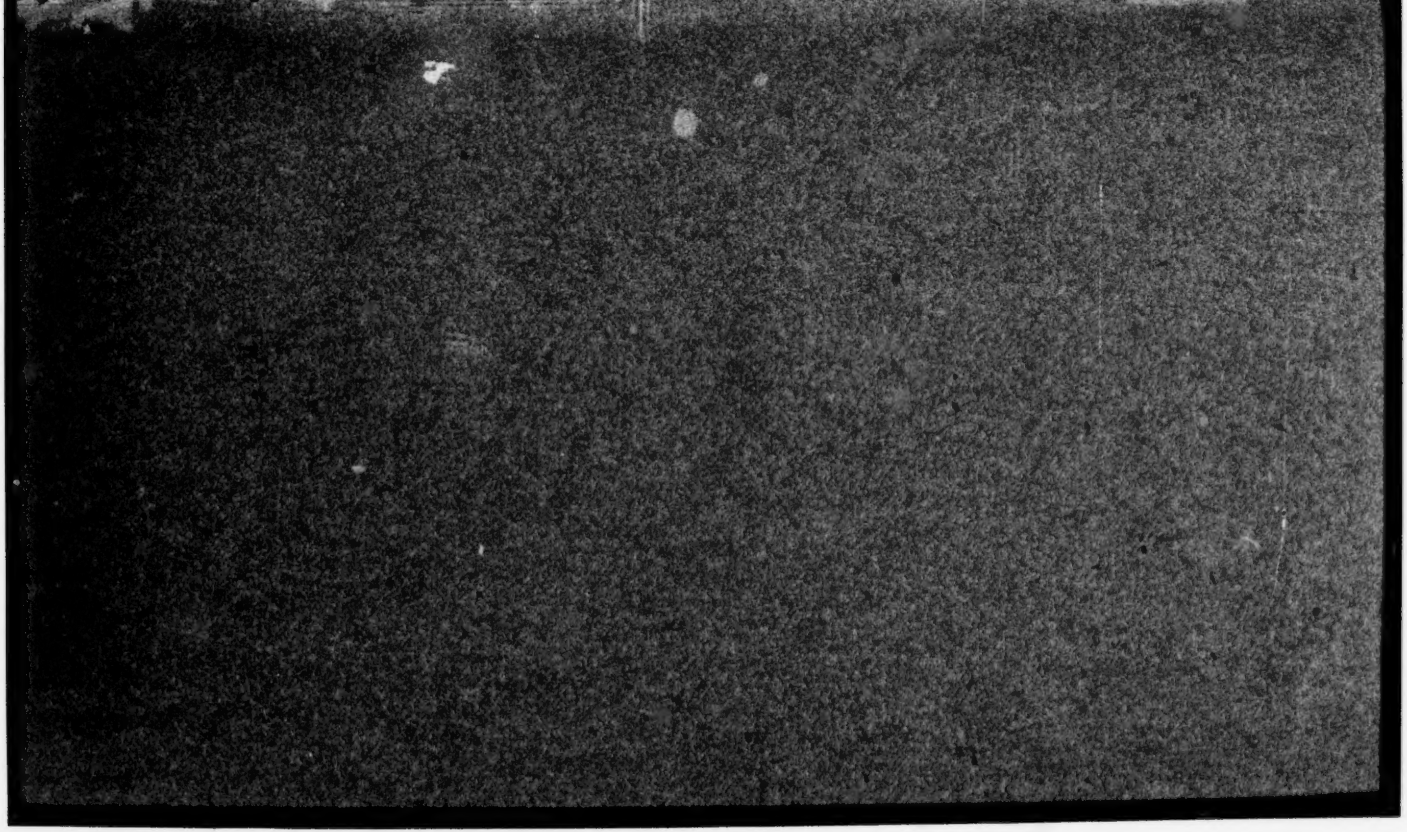
vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JUNE 6, 1900.

(16,901.)



(16,901.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 316.

JOHN J. WALSH, PLAINTIFF IN ERROR,

vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1898.

1-4 Supreme Court of Ohio.

JOHN J. WALSH, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS Railroad Company, Defendant in Error. } No. 5622.

Record.

In error to the circuit court of Franklin county.

R. A. Harrison, T. E. Powell, J. B. Foraker, D. J. Ryan, attorneys for plaintiff in error.
D. L. Sleeper, attorney for defendant in error.

Filed Aug. 4, 1897. In supreme court Ohio.
J. B. ALLEN, *Clerk.*

5 Supreme Court of Ohio.

JOHN J. WALSH, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS Railroad Company, Defendant in Error. } No. 5622.

Petition in Error.

(Filed June 25, 1897.)

The said John J. Walsh, plaintiff in error, complains of The Columbus, Hocking Valley and Athens Railroad Company, defendant in error, and says:

That at the January term, A. D. 1897, of the circuit court in and for Franklin county, Ohio, to wit: on the 2d day of April, A. D. 1897, the defendant in error recovered a judgment by the consideration of said court against the plaintiff in error in a certain action then pending in said court, wherein the said plaintiff in error was plaintiff and the defendant in error was defendant, together with the costs of suit a certified copy of the journal entries in said action, together with the original papers therein, is herewith filed.

Plaintiff in error avers that there is error in said judgment, proceedings, and record in this, to wit:

1. Said circuit court erred in sustaining the demurrer of the defendant to the plaintiff's petition.

6 2. Said court erred in dismissing the plaintiff's petition in said cause.

3. Said court erred in rendering judgment against the plaintiff for the costs of said action.

Wherefore, the plaintiff in error prays that said judgment of the

circuit court be reversed and that the plaintiff in error may be restored to all things he has lost by reason thereof.

R. A. HARRISON,
T. E. POWELL,
J. B. FORAKER,
D. J. RYAN,
Attorneys for Plaintiff in Error.

The defendant in error hereby waives the issue and service of summons in error in the above-entitled cause and enters the appearance of the defendant in error herein.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILWAY CO.,
By D. L. SLEEPER,
Attorney for Defendant in Error.

7 *Transcript of Docket and Journal Entries.*

In the Circuit Court.

(Filed June 25, 1897.)

1895, April 22.—Appeal bond filed.
1895, April 22.—Transcript, journal entries filed.
1895, April 22.—Original papers filed.
1897, April 2.—Defendant's demurrer sustained. Defendant to receive costs of plaintiff's exceptions by plaintiff. 4–594.

January Term, April 2, 1897.

This day came the parties and thereupon this cause came on to be heard upon the demurrer filed by the defendant herein to the petition of the plaintiff, and was argued by counsel and submitted to the court; on consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing and not desiring to plead further, it is considered by the court that the defendant go hence without day and receive from the plaintiff its costs herein expended. To all of which orders, judgments and decrees the plaintiff by his counsel excepts.
(Duly certified.)

8 In the Circuit Court, Franklin County, Ohio.

JOHN J. WALSH, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILWAY, Defendants. } No. 1079.

Entry.

(Filed April 2, 1897.)

This day came the parties and thereupon this cause came on to be heard on the demurrer filed by the defendant herein to the petition

of the plaintiff and was argued by counsel and submitted to the court;

On consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing, and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended.

To all of which orders, judgments and decrees the plaintiff by his counsel excepts.

9 *Transcript of Journal Entries.*

In the Court of Common Pleas.

(Filed in circuit court April 22, 1895.)

I, Charles F. Galloway, clerk of the court of common pleas, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

1895, March 14.—Petition, affidavit and precipe filed. Temporary restraining order allowed. Bond fixed at $300.00 Bond filed. Summons and copy of entry issued to sheriff of Franklin county, Ohio. Returned, March 25. Answer, April 13, 1895. Copy of petition, $6.00.

1895, April 17.—Demurrer of defendant filed.

1895, April 18.—Motion for temporary injunction overruled. Defendant's demurrer sustained. Judgment against plaintiff for costs. Plaintiff serves notice of appeal. Bond fixed at $100.00. 93-290.

1895, April 22.—Appeal bond filed.

April Term, April 18th, 1895.

This day came the said parties by their respective counsel and thereupon came on for hearing the motion of the said plaintiff for a temporary injunction against the said defendant, was heard upon the petition and affidavits, exhibits, and other evidence and the arguments of counsel and was submitted to the court; upon consideration whereof, and the court being fully advised in the premises, it is considered and adjudged by the court that said motion is not well taken and the same is therefore overruled; to which ruling and order the plaintiff at the time duly excepted; thereupon came

10 the defendant and filed its demurrer to the petition of the plaintiff herein upon the grounds that the facts stated therein are not sufficient to constitute a cause of action in favor of said plaintiff and against the defendant; upon arguments of counsel and submission to the court, it is considered that said demurrer is well taken and the same is sustained, to which ruling of the court the plaintiff at the time duly excepted; therefore, the plaintiff not desiring to plead further herein, it is adjudged and considered that the said defendant go hence without day, and that it recover its costs

herein against the plaintiff, whose petition is hereby dismissed; to which the plaintiff also at the time duly excepted, and therefore the plaintiff gave notice of his intention to appeal his case to the circuit court, and the court do fix the undertaking to be given to perfect said appeal at $100.00.

(Duly certified.)

11 Court of Common Pleas, Franklin County, Ohio.

JOHN J. WALSH, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD Company, Defendant.

Petition.

(Filed March 14, 1895.)

The said plaintiff, John J. Walsh, complains of the defendant, The Columbus, Hocking Valley and Athens Railroad Company, and says that he is the owner in fee-simple of certain lands and tenements situated in the county of Fairfield and State of Ohio, and being bounded and described as follows:

Situate in the north half of section number twenty (20), township fifteen (15), range nineteen (19), Greenfield township, Fairfield county, Ohio.

Beginning at a point in the center of the Hocking canal, south ten (10) degrees, east along the said canal sixteen (16) chains from the north line of said section; thence north eighty-two degrees (82), east eleven (11) chains to the center of the Lancaster and Carroll pike, thence with the center of said pike south forty-five (45) degrees, east four (4) chains, four (4) links, thence south fifty-seven (57) degrees, east five (5) chains, ninety-one (91) links; thence south sixteen (16) chains, ninety-five (95) links to the center of said Hocking canal; thence north fifty-two (52) degrees, west
12 along the center of said canal twelve (12) chains, thirty-eight (38) links; thence west fifteen (15) chains, thirty-one (31) links; thence north eleven (11) chains, eighty-five links to a stone; thence north seventy (70) degrees, east six (6) chains, fifty (50) links to the place of beginning. Containing thirty-six and twenty-hundredths (36.20) acres of land, more or less; subject, however, to the right of way one hundred feet in width owned and occupied by the Columbus, Hocking Valley & Toledo Railway Company.

That said lands are located on both sides of the Hocking canal about five (5) miles north of the city of Lancaster, in the said county. That said canal runs through the said lands north and south, dividing the said lands hereinbefore described into two sections.

Plaintiff further says that the said Hocking canal which runs through the lands above described extends from the village of Carroll in the county of Fairfield, from the Ohio canal, through the counties of Fairfield and Athens to the village of Nelsonville in

said last-named county, and the same has since its construction been a part of the canal system of the State of Ohio, and an extension of the Ohio canal, and the State of Ohio is the owner of said canal, which is now in use for navigation and other purposes hereinafter set forth.

The plaintiff further says that the said defendant, The Columbus, Hocking Valley and Athens Railroad Company, on the 12th day of April, A. D. 1894, filed with the secretary of state its articles of incorporation in said name, which articles of incorporation were then and there duly recorded, and that the principal office of said company fixed by said articles, is at the city of Columbus, in the county of Franklin in said State. Said corporation was organized
13 for the purpose of building and operating a railroad from the city of Columbus, in the county of Franklin and extending through the counties of Franklin, Fairfield, Hocking and Athens, to the city of Athens, all in the State of Ohio.

The plaintiff further says that while the capital stock of said defendant was fixed at a hundred thousand dollars by its articles of incorporation, and while the same has been ostensibly subscribed, the same has not been paid in cash nor has any part thereof been paid in cash or in any other manner except a few hundred dollars. And while the said defendant has obtained a certificate of incorporation from the secretary of state, the said corporation has not been legally organized, and the said company is not authorized to act as a corporation or to exercise the power of eminent domain which it is attempting to do as hereinafter set forth.

And the plaintiff further says that the said defendant since the 18th day of May, A. D. 1894, has been and still is claiming the right, privilege and franchise, of entering upon, taking possession of, and controlling the Hocking canal above described, and especially that portion extending through the lands of plaintiff above described, including all the property, right, interests and appurtenances connected with said Hocking canal between the points above named. And the said defendant has located a line of road through the lands of the said plaintiff hereinbefore described following the tow-path of said Hocking canal, and the said defendant is illegally and wrongfully claiming the right of entering upon said canal property and the said premises of the plaintiff hereinbefore described, and it is about to construct a railroad through said lands which will place additional and heavy burdens upon the lands of the plaintiff.
14 The said defendant claims the right, privilege and franchise of taking possession of said property and constructing and operating a railroad along and over the said canal and the premises of the said plaintiff, by virtue of an act of the General Assembly of the State of Ohio, passed on the 18th day of May, A. D. 1894. Said act is in the words and figures following, to wit:

S. B. An act No. 315.

To provide for the abandonment of the Hocking canal for canal purposes and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking canal, from its junction with the Ohio canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise, and privilege of constructing, maintaining and operating over, upon and along the Hocking canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said installment of fifty thousand dollars shall be paid into the State treasury before the construction of said railroad is begun, and for the remaining installments of rental the State of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges, and other structures erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of State, the secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State

harmless from all loss or damage resulting to such property-
16 holders by reason of the construction and operation of said railroad. Provided that when said railroad, its successors and assigns cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

LEONIDAS H. SOUTHARD,
Speaker pro Tem. of the House of Representatives.
ANDREW L. HARRIS,
President of the Senate.

Passed May 18th, 1894.

The said plaintiff further says, that if the said defendant is permitted to enter upon said canal and construct its railroad thereon, it will divide the lands of the said plaintiff into two sections; and the construction of said railroad will place increased burdens upon his said lands, and will cut off and destroy his access to different parts of said lands and will render his access to and egress from different portions of said lands very difficult and inconvenient, and great additional burdens will be placed upon his said lands by reason of the change from a canal to a railroad; and his said property will be so affected and impaired as to render the same of very little or no value.

The plaintiff further says, that since the said Hocking canal was abandoned by the State of Ohio, by the act of May
17 18th, 1894, the fee in the said lands occupied by said canal bed has reverted to the said plaintiff. That the State of Ohio, at the time of the passage of said act, and for a long time prior thereto, had an easement in the said canal bed and in the lands covered, for canal purposes only. The fee thereto subject to said easement remaining in the former owners and in this plaintiff who has succeeded to the title thereto by regular and proper deeds of conveyance in fee-simple, and that since the said abandonment the said plaintiff is the owner of that portion of the canal bed and tow-path, extending through his lands, as hereinbefore described; and that the said defendant is claiming the right to enter upon the said land and canal bed and construct a railroad extending through the premises of the plaintiff without any right or authority whatever, and in violation of the rights and interests of the plaintiff.

The said Hocking Canal property, above described, was acquired by the State of Ohio, and the said canal was constructed under and by virtue of certain acts of the Congress of the United States, and of the General Assembly of the State of Ohio, under and by virtue of certain agreements entered into by and between

the United States and the State of Ohio, as hereinafter set forth. That between the 23d day of February, 1820, and the 8th day of February, 1825, the General Assembly of the State of Ohio presented to the Senate and House of Representatives of the United States, memorials and resolutions in which were set forth the advantages which the United States would derive from the construction of certain canals, and particularly the Ohio canal, extending from the Ohio river at the mouth of the Scioto river, to Lake Erie, and requesting the Congress of the United States to grant to the State of
18 Ohio aid in the construction of said canal and extensions thereof, which might thereafter be made.

And thereupon, in response to said resolutions and memorials, on the 24th day of May, 1828, the Congress of the United States passed an act entitled "An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in the construction of said canals authorized by law;" the fifth section of which act is in the words and figures following, to wit:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the State of Ohio, five hundred thousand acres of land owned by the United States, within the said State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, contracted by said State in the construction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extensions of canals now making; which lands, when selected, shall be disposed of by the legislature of Ohio, for that purpose and no other: Provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same; and provided further, that the said canals, already commenced shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales, shall not be affected by that failure."

19 It was further provided by the seventh section of the said act that "said act shall take effect provided the legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions thereof; and unless such expression of assent be made, this act shall be wholly inoperative."

And thereupon, in pursuance of said act of Congress, on the 22d day of December A. D. 1828, the General Assembly of the State of Ohio assented to the several provisions of said act; which said act is in the words and figures following, to wit:

"An act declaring the assent of the State of Ohio to the provisions and conditions of an act of Congress."

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the assent of the State of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty-eight, and entitled 'An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas Territory.'

"EDWARD KING,
"*Speaker of the House of Representatives.*
"SAMUEL WHEELER,
"*Speaker of the Senate.*

"December 22d, 1828."

That in pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the State of Ohio, the State of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said act hereinbefore set forth, and has from time to time sold and disposed of the same, and has received from the proceeds of such sale upwards of the sum of $2,200,000. That at the time of the passage of the several acts above mentioned, the Ohio canal, extending from the mouth of the Scioto river through the State of Ohio to Lake Erie, was then located and in process of construction, with its various branches and extensions, which said canal passed through the village of Carroll, in said county of Fairfield. That afterwards, to wit, on the 8th day of February A. D. 1826, (Ohio Laws, vol. 24, p. 71,) the Lancaster Lateral Canal Company was incorporated by an act of the General Assembly of the State of Ohio, and authorized to construct and operate a canal extending from the village of Carroll to the town of Lancaster in the county of Fairfield, connecting with the Ohio canal at the said village of Carroll.

And thereupon the said company so incorporated did construct and operate the said canal between the points aforesaid until the 22d day of December, 1838, when the said Lancaster Lateral Canal Company sold and conveyed the said canal between the said points, to the State of Ohio, the said purchase being made by the board of public works, by authority conferred upon the said board by an act of the General Assembly of the State of Ohio, passed March 9, 1838, the said Lancaster Lateral Canal Company, by deed of that date, conveyed the said canal and all its rights, interests, appurtenances and fixtures connected therewith, to the State of Ohio, for the sum of $61,241, the said sum being paid to the said company by the board of public works, in pursuance of said act, out of the canal funds belonging to the

State of Ohio created by the sale of the lands granted by the United States, as hereinbefore set forth.

Afterwards, to wit, on March 7th, 1836, the General Assembly of the State of Ohio, by an act passed on that date, authorized the canal commissioners of the board of public works of the said State to extend the said Lateral canal from its terminus in the town of Lancaster, to the town of Athens, in Athens county; and the said commissioners were, by the said act, authorized to borrow on the credit of the State of Ohio $350,000, for the purpose of constructing the said canal; and afterwards the said commissioners were authorized, by an act of the General Assembly, to borrow the additional sum of $300,000, for the purpose of completing the said canal between the points aforesaid.

The plaintiff further says, that the said canal so authorized to be constructed, was completed and opened as a continuous line of canal for navigation purposes, on and prior to the first day of January, 1842. The entire purchase price of said Lateral canal, above described, and the continuation thereof from Lancaster to Athens, as well as the loan above referred to, made for the purpose of constructing the said canal, was paid out of the canal fund of the State of Ohio, which said fund was, in part at least, created by the proceeds of the sale of said lands granted to the State of Ohio as hereinbefore stated. And thereupon the said canal was constructed by the State of Ohio and became and was, and ever since has been, an extension and continuation of the Ohio canal from the village of Carroll to its termination in the said county of Athens.

22 The plaintiff further says, that ever since the construction of said canal, which is and has been known as the Hocking canal, the same has been, and still is, a public highway, which has been used for the use of the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress and of the General Assembly of the State of Ohio, hereinbefore set forth.

Plaintiff further says that the said act under which the said defendant claims the right to enter upon and take possession of the canal, and to construct and operate a railroad thereon, passed May 18, 1894, and commonly known as the Earnhart act, confers no authority, power, or right upon said defendant to enter upon said lands, or to use the same for the purpose of building and operating a railroad, or for any purpose whatever.

Plaintiff says that the said act is null and void, for the following reasons:

1. Because the said act conflicts with section 10, article 1, of the Constitution of the United States, which provides that "No State shall pass any bill impairing the obligation of contracts."

2. Because said act conflicts with section 28, article 2, of the constitution of the State of Ohio, which provides that "The General Assembly shall have no power to pass laws impairing the obligation of contracts."

3. Because said act conflicts with article 13, section 1, of the constitution of the State of Ohio, which prohibits the legislature from passing any special act conferring corporate powers.

4. Because said act conflicts with section 16, article 2, of the constitution of the State of Ohio, which provides, "No bill shall contain more than one subject which shall be clearly expressed in the title."

23 5. The plaintiff further says that the said Hocking canal was at the time of said grant, and now is, worth at least from $600,000 to $700,000 for the purposes of the right of way for the construction of a railroad. That at the time of the passage of said act, the legislature of Ohio had before it a proposition from another railroad company duly incorporated under the laws of this State, having a large- capital and greater responsibility than the defendant, and which proposed to use said canal for the construction of a railway exactly as proposed by the defendant and proposed to construct the railroad in a much shorter space of time; the sum so offered by said other company being $5,000 a year larger than that for which said right of way was granted to the defendant, and at the same time it was proposed to the legislature that if such property was offered to competitive bidding the said other corporation would bid for the same an annual rental upon the basis of a valuation of $500,000.

6. The plaintiff further says that while the grant to the defendant of said canal, as hereinbefore stated, was in form a lease thereof, yet in substance and in fact it was a donation of the greater part of said property to the said defendant for its own private purposes; that said act is null and void because it is against public policy, and against the rights and interests of the people of Ohio, and it is not within the grant of legislative power given to the General Assembly by the provisions of article 2 of the constitution of Ohio.

7. The plaintiff further says, that the Lancaster Lateral Canal Company, which constructed the part of said Ohio canal between Carroll and Lancaster, acquired only the easement for the purposes of navigation along and over the lands through which said canal was located and constructed, and that by the conveyance of that part of the said property by said company to the State of

24 Ohio, the State of Ohio only acquired the same right and interest in and to that portion of the said canal which the said Lancaster Lateral Canal Company had at the time of the said conveyance.

8. The plaintiff further says, that as the said grant made by the said act of the General Assembly of May 18th, 1894, purports to convey a greater title than the State had in the said canal property, and also attempts to confer upon said defendant the right to use the said property for purposes other and different from that for which the State had the right to use the same, the said grant is excessive and greater than the General Assembly of Ohio had the power to convey, and therefore void.

The plaintiff further says that the said defendant has complied with the terms and provisions of the said act of the General Assembly of date of May 18th, 1894, and has already given bond to the State of Ohio, as provided for in said act, and the said defendant is also unlawfully making preparations to build, maintain and oper-

ate said railroad upon said line and upon said canal, and for this purpose it is unlawfully and without authority threatening to take possession of said canal and of said property and fixtures connected therewith for the sole purpose of building, maintaining and operating a railroad thereon for all time to come, without having acquired the rights and interests in the said lands and tenements belonging to the plaintiff, and without having purchased or acquired by condemnation or otherwise, the right to enter upon said lands and construct said railroad. And the said defendant is threatening to and will construct a railroad thereon which will constitute a permanent trespass upon the plaintiff's property; and will also place very large additional burdens upon said plaintiff's land by rendering the same inconvenient and difficult of access, and great and irreparable injury will be done to plaintiff in the premises, unless the defendant is restrained by an order of this court from taking possession of said canal and the said premises of plaintiff and constructing this railroad thereon.

The said plaintiff, therefore, prays the court here, that the said defendant may be enjoined from entering upon the said canal property and upon any portion of the plaintiff's premises and from constructing and operating a railroad thereon, and from doing any and all acts which are now threatened by the said defendant in the premises, and that it may be declared by the court that the said defendant is not a legally organized corporation, and that it has no power as a corporation, to build, construct, or operate a railroad on account of its failure to comply with the statutes and laws of this State as hereinbefore set forth. And that it may also be declared by the court that the act of the General Assembly of Ohio of date May 18th, 1894, under which the said defendant claims to be acting, may be declared by the court to be null and void; and that upon the final hearing the plaintiff may have a perpetual injunction restraining the defendant from doing any and all acts herein complained of.

By POWELL, RICKETTS & BLACK AND
DANIEL J. RYAN,
Attorneys for Plaintiff.

(Verification and certificate attached.)

Precipe.

(Filed March 14, 1895.)

To the clerk of said court:

Issue summons upon the above-named defendant, directed to the sheriff of Franklin county and returnable according to law. Endorse: Petition for an injunction and other equitable relief.

By DANIEL J. RYAN AND
POWELL, RICKETTS & BLACK,
Plaintiff's Attorneys.

Restraining order awarded till a motion for an injunction can be heard and decided, upon the plaintiff executing an

undertaking in the penalty of $300.00, conditioned as required by law and signed by a surety or sureties to be approved by the clerk of the courts. And it is further ordered that the said motion be heard on the 23rd day of March, 1895, at 10 o'clock a. m., or as soon thereafter as it can be heard, and the plaintiff will give the defendant written notice of the time and place for hearing said motion.

D. F. PUGH, *Judge.*

March 14th, 1895.

Demurrer to Petition.

(Filed April 17, 1895.)

The defendant demurs to the petition of plaintiff in the above-entitled case, and for the grounds thereof says that said petition does not state facts sufficient to constitute a cause of action against this defendant.

D. L. SLEEPER AND
SELWYN N. OWEN,
Attorneys for Defendant.

Entry.

(Filed April 17, 1895.)

This day came the said parties by their respective counsel and thereupon came on for hearing the motion of the said plaintiff for a temporary injunction against the said defendant, was heard upon the petition and affidavits, exhibits, and other evidence and the arguments of counsel, and was submitted to the court.

27 Upon consideration whereof, and the court being fully advised in the premises, it is considered and adjudged by the court that said motion is not well taken, and the same is therefore overruled; to which ruling and order the plaintiff at the time duly excepted.

Thereupon came the defendant and filed its demurrer to the petition of the plaintiff herein, upon the grounds that the facts stated therein are not sufficient to constitute a cause of action in favor of said plaintiff and against the defendant. Upon argument of counsel and submission to the court, it is considered that said demurrer is well taken and the same is sustained; to which ruling of the court the plaintiff at the time duly excepted.

Thereupon, the plaintiff not desiring to plead further herein, it is adjudged and considered that the said defendant go hence without day, and that it recover its costs herein against the plaintiff, whose petition is hereby dismissed; to which the plaintiff also at the time duly excepted.

And thereupon the plaintiff gave notice of his intention to appeal this case to the circuit court, and the court do fix the undertaking to be given to perfect said appeal at $100.00.

28 *Certified Transcript of Docket and Journal Entries.*

THE STATE OF OHIO, }
City of Columbus, } *ss:*

In the Supreme Court of Ohio, January Term, A. D. 1898.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

JOHN J. WALSH, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND Athens Railroad Company, Defendant in Error. } # 5622. Error to the Circuit Court of Franklin County.

June 25, 1897.—Petition in error & waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers filed.
" 26, " Papers taken by D. J. Ryan.
Aug. 4, " " returned by D. J. Ryan.
" " " Printed record filed.
" 16, " Proof of service —printed record filed.
Sept. 30, " Motion by defendant to advance and notice filed.
Oct. 5, " Journal entry:

"Motion by defendant to advance cause No. 5622 on the general docket. Oral argument requested."

"Ordered by the court that said motion be, and the same is hereby, allowed, cause advanced, and briefs to be filed within rule. Oral argument noted."

Order Book No. 15, page 379.

Dec. 18, 1897.—Plaintiff's printed brief filed.
Feb. 4, 1898.—Defendant's printed brief and proof of service filed.
" " " Printed oral argument of Levi Burgess of defe't's counsel and proof of service filed.
" 9, " Proof of service of def't's printed brief filed.
Mar. 22, " Journal entry:

29 "This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county, and was argued by counsel; on consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and it hereby is, reversed at the costs of the defendant in error, to be taxed; and, rendering the judgment the court below should have rendered, it is ordered and adjudged that the said Columbus, Hocking Valley and Athens Railroad Company be, and is hereby, enjoined from entering upon the lands of the plaintiff in error described in his petition until it has condemned and paid for the additional burthen of constructing and operating a railroad on the land according to law.

It is further ordered and adjudged that the plaintiff in error recover in this court and in the circuit court his costs in this behalf expended, to be taxed.

Ordered that a special mandate be sent the court of common pleas of Franklin county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the circuit court of Franklin county 'for entry.'"

Order Book No. 16, page 34.

Mar. 29, 1898.—Mandate issued.

April 29, 1898.—Journal entry:

"On motion of the said plaintiff in error, this court doth order that it be certified and made a part of the record in this case and of the judgment rendered herein by this court at the present term thereof, to wit, on the 22nd day of March, A. D. 1898, and of the entry thereof, that in the rendition of said judgment it became and was material to the case to determine whether an act of the General Assembly of the State of Ohio entitled 'An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company,' passed May 18th, 1894, and found in vol'e 91, page 327, of the Laws of Ohio, is a law of said State and was and is of binding force and validity against the said plaintiff in error. The court order- that it further be certified that said plaintiff in error, on the hearing of said cause, claimed and asked this court to hold that the said act is in violation of and repugnant to section 10 of article I of the Constitution of the United States, which ordains that 'No State shall pass any bill impairing the obligation of contracts;' and this court orders it to be further certified that this court decided and adjudged that said act passed by the General Assembly of Ohio as aforesaid was not in violation of nor repugnant to said section 10 of article I of the Constitution of the United States and decided and adjudged that said act was and is valid and binding upon said plaintiff in error, and thereupon rendered said judgment, which is founded upon said decision of this court that said act was and is of binding force and validity against the said plaintiff in error; and this court further ordered a special mandate to carry said judgment into execution, as is shown by the entry heretofore made of said judgment and order; and it is further ordered by this court to be certified that the question of the validity of said act of the General Assembly in the particular mentioned hereinabove was drawn in question on the hearing and decision of this case as being repugnant to said section 10 of article 1 of the Constitution of the United States, and that the decision of the court was in favor of the validity of said act as against the said plaintiff in error; and it is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had."

Order Book No. 16, page 74.

31 Supreme Court of Ohio.

THE STATE OF OHIO, } ss:
City of Columbus, }

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing are all the entries in cause No. 5622, John J. Walsh *vs.* The Columbus, Hocking Valley and Athens Railroad Company, and are truly taken and correctly copied from the minute and order books of said court, and that the printed record hereto attached is a true copy of the printed record filed in this cause in this court and used in the consideration of said cause by said court.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court this twelfth day of May, A. D. 1898.

JOSIAH B. ALLEN, *Clerk.*

32

VOUGHT
v.
THE COLUMBUS, HOCKING VALLEY & ATHENS R. R. Co.

WALSH
v.
SAME.

WRIGHT
v.
SAME.

SHOTWELL
v.
SAME.

Abandonment of Hocking canal—Validity of act of May 18, 1894—A stranger to a contract cannot insist on its performance—Rights of owners of property abutting on canal—Law of contract—Constitutional law.

1. The act of the General Assembly providing for the abandonment of the Hocking canal and for leasing the same to the Columbus, Hocking Valley & Athens R. R. Co., passed May 18, 1894 (91 Laws, 327), does not confer corporate powers, nor impair the obligation of contracts, nor in any other manner conflict with the constitution of the State, and is a valid law.
2. A party cannot, for his own benefit, insist upon the performance of a contract between others and to which he is not a party or privy; nor claim relief against either of the parties
33 to such contract, for investments or improvements he may have made on the assumption that the contract would be observed.

3. Owners of lands abutting on a canal, incidentally benefited by the water it affords, or its facilities for drainage, have no property interest in these incidental benefits, and cannot, on such ground, enjoin the abandonment of the canal, or claim compensation therefor.
4. Contracts made with the board of public works or other agents of the State, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the State and no action will lie against the State for damages resulting from such abandonment.
5. Lands acquired for its use by a canal company, a private corporation, organized under an act of the General Assembly before the adoption of the present constitution, as the Lancaster Lateral Canal Company, 24 Laws, 71, authorizing it to acquire lands for its use by donation, grant or appropriation, without expressing the interest or estate to be acquired thereby, revert to the owner from whom they were acquired, on the abandonment of the canal, or his successor in title. The general rule being, that where lands are acquired for a public use, an easement only is taken therein, unless the taking of a greater estate, as a fee-simple, is expressly authorized by law. And the rule is the same where it afterwards disposes of its canal to the State, which, under the act of 1825, takes a fee-simple in lands condemned by it to the uses of its canal system.
6. Where, however, the land is only abandoned by the State for canal purposes, and is at the same time leased or conveyed to a railroad company for the construction and operation of a railroad thereon, the owner is only entitled to compensation for such additional burthen thereby imposed on the land, and such damages as may result from the new use. *Hatch v. Railroad Co.*, 18 Ohio St., 92.

(Decided March 22, 1898.)

Error in such case to the circuit court of Franklin county.

The above cases have been heard and submitted together because the principal question, the validity of the act whereby the State, through its legislature, abandoned the Hocking canal for
34 canal purposes and leased it to the Columbus, Hocking Valley and Athens R. R. Co., is common to all of them. The questions arise upon a demurrer to the petition in each case. That in Vought's case is as follows: "The said plaintiff, Michael S. Vought, says, that he is a resident of the county of Fairfield, and a citizen and tax-payer of the State of Ohio. That he is now, and for some time past has been, the owner in fee-simple of a certain tract of land situated in the county of Fairfield and State of Ohio, and being parts of sections Nos. 20, 21 and 28, in Greenfield township, No. 15 and range 19, and bounded and described as follows:

On the north by the lands of George Buzzard and by the Hocking canal, on the east by the Hocking canal, and on the south by other

lands of the plaintiff, and by the lands of Zebulon Peters, Silas Peters, W. W. Donaldson, John Duddleson, and William Stanberry's heirs; and on the west by the lands of Silas Peters' heirs, John Duddleson, W. W. Donaldson, William Stanberry's heirs, M. A. Stanberry and John Ruff, containing six hundred acres more or less, all of which is in actual occupancy of plaintiff. That said lands are, and have been for many years, under a high state of improvement and used for the purposes of cultivation, and have a special value from their location, and that for the purposes of reclaiming and draining said land, he has laid thereon about seventeen miles of drain tile.

Plaintiff further says, that heretofore, to wit, on the 8th day of February, 1826 (Ohio Laws, vol. 24, page 71) the Lancaster Lateral Canal Company was incorporated by an act of the General Assembly of the State of Ohio, and authorized to construct and operate a canal extending from the village of Carroll to the city of Lancaster, connecting with the Ohio canal at said village of Carroll.

35 A copy of which said act of incorporation is hereto attached marked "Exhibit A," and made a part of this petition.

Plaintiff further says, that in and by said act, said Lancaster Lateral Canal Company was authorized to appropriate lands for the purposes set forth therein, and in and by the same the said State of Ohio reserved the right to purchase said canal at its cost price. That thereupon said canal company acquired the right to use the lands upon which it is now located, for the purpose of a canal, and did construct the same. That afterwards and on the 22d day of December, 1838, the said State of Ohio elected to purchase said canal, and did, in fact, purchase the same and received a conveyance thereof from said canal company to be held and used by the State of Ohio for the purposes of navigation. A copy of said deed is in the words and figures following, to wit:

Whereas, by an act of the General Assembly of the State of Ohio, of the ninth of March, 1838, entitled "An act to authorize the board of public works to purchase for the use of the State of Ohio, the Lancaster Lateral canal," it is, amongst other things, provided that the board of public works are thereby authorized and required, in the name and for the use of the State of Ohio, to purchase of the directors of the Lancaster Canal Company, the said canal, and hold the same for the use of the State, paying therefor the actual cost of locating, constructing and repairing the said canal, with lawful interest as the same shall be established by the oaths of the proper officers of said company, deducting therefrom the amount granted by the State in aid of said canal, with lawful interest thereon from the time of payment thereof.

36 And whereas, the said board of public works and the president and directors of said Lateral Canal Company, in conformity with the provisions of purchase above recited, have fixed and adjusted the sum to which the said company is entitled, at sixty-one thousand two hundred and forty-one dollars and four cents, being the

actual cost of locating, constructing and repairing said canal, after deducting the amount granted by the State in aid of said canal, with interest thereon as the same has been established by the oaths of the proper officers of said company.

Now know ye, that the said Lateral Canal Company, for and in consideration of the premises and for and in consideration of the said sum of sixty-one thousand two hundred and fo[illegible] one dollars and four cents, to the said company paid by the State [illegible] Ohio, and for the purpose of carrying into effect the above-recited act, doth by these presents grant, bargain, sell and convey to the State of Ohio and its assigns, in fee-simple, the said Lancaster Lateral canal, with all the fixtures and easements thereto appertaining, for the purposes of navigation, to have and to hold the same to the said State of Ohio and its assigns forever, in as full and ample a manner as the said company now hold and possess the same.

In testimony whereof, the said company has caused their common seal to be hereto affixed by John Creed, their president, on this twenty-second day of December, A. D. eighteen hundred and thirty-eight (1838).

[SEAL.] JOHN CREED, *President.*

Signed, sealed, and delivered in presence of—

W. T. MARTIN.
JAMES TAYLOR, JR.

37 THE STATE OF OHIO, } ss:
Franklin County, }

Before me, the subscriber, an acting justice of the peace within and for said county, personally appeared John Creed, president of the Lancaster Lateral Canal Company, and acknowledged the foregoing instrument of writing to be the proper act and deed of said company, for the purposes therein mentioned.

Given under my hand and seal this 22d of December, A. D. 1838.

W. T. MARTIN,
Justice of the Peace.

LANCASTER, *Dec.* 22, 1838.

At a meeting of the directors of "the Lancaster Lateral Canal Company."

Present: John Creed, president; Samuel F. McCracken, Thomas Ewing, Philemon Beecher, —— Scofield, Benjamin O'Connell, and Jacob Green.

Ordered that John Creed, president for the company, do place the common seal of the conveyance of this date, made by the company to the State of Ohio, of the Lancaster Lateral canal, and that said president acknowledge and deliver the said deed in the name of the company.

F. A. FOSTER, *Secretary.*

RECORDER'S OFFICE, FAIRFIELD COUNTY, OHIO.

This instrument of writing received December 24, 1838, and recorded 29th same month in Book No. 4, pages 357 and 358.
Attest: W. L. KING, *R.*, *F. C.*

38 Endorsement on deed.

RECORDER'S OFFICE, FAIRFIELD COUNTY, OHIO.

This deed received December 24, 1838, and recorded 29th same month in Book No. 4, page 358.
Attest: W. L. KING, *R.*, *F. C.*

Plaintiff says that many years ago the State of Ohio, through certain aid granted to the State by the United States, and by virtue of a certain compact entered into by the United States and the State of Ohio, which is hereafter more fully set forth, made certain purchases and acquired the right to extend said canal to the town of Nelsonville, in Athens county, and did complete and extend the same, and the same is known and commonly called the Hocking canal, and the east line of plaintiff's said lands is in the center of said canal. The plaintiff further says that the said Hocking canal extends from the village of Carroll, in Fairfield county, and the Ohio canal, through the counties of Fairfield, Hocking and Athens to the village of Nelsonville, in the said last-named county; and the same has since its construction been a part of the canal system of the State of Ohio, and an extension of the Ohio canal, and the State of Ohio is the owner of and in possession of said canal, which is now in use for navigation and other purposes hereinafter set forth.

The plaintiff further says, that the said defendant, The Columbus, Hocking Valley and Athens Railroad Company, on the 12th day of April, 1894, filed with the secretary of state its articles of incorporation in said name, which articles of incorporation were
39 then and there duly recorded, and that the principal office of said company, fixed by said articles of incorporation, is at the city of Columbus, in the county of Franklin, in said State. Said corporation was organized for the purpose of building and operating a railroad from the city of Columbus, in the county of Franklin, and extending through the counties of Franklin, Fairfield, Hocking and Athens, all in the State of Ohio, the said corporation being authorized to exercise such powers, rights, privileges and franchises only as are provided for and conferred by the general laws of the State of Ohio, regulating the organization and incorporation of railroad companies.

Plaintiff further says that said defendant, since the 18th day of May, 1894, has been and still is claiming the right, privilege and franchise of entering upon, taking possession of and controlling the Hocking canal, above described, and especially that portion extending through the lands of plaintiff, above described, including all the property, rights, interests and appurtenances connected with said Hocking canal, between the points above named. The said defendant claims the right, privilege and franchise of taking possession,

controlling said property and constructing and operating a railroad along and over the said canal, by virtue of an act of the General Assembly of the State of Ohio, passed on the 18th day of May, A. D. 1894. Said act is in words and figures following, to wit:

S. B. An act No. 315.

To provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

40 SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking canal, from its junction with the Ohio canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise, and privilege of constructing, maintaining and operating over, upon and along the Hocking canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said installment of fifty thousand dollars shall be paid into the State treasury before the construction of said railroad is begun, and for the remaining installments of rental the State of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges, and other structures erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said
41 Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of State, the secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property aforesaid

or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property-holders by reason of the construction and operation of said railroad.

Provided that when said railroad, its successors and assigns cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

SEC. 6. The work of constructing said railroad shall be
42 commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

LEONIDAS H. SOUTHARD,
Speaker pro Tem. of the House of Representatives.
ANDREW L. HARRIS,
President of the Senate.

Passed May 18, 1894.

The said Hocking Canal property above described was acquired by the State of Ohio by virtue of the acts relating to the Lancaster Lateral Canal Company, above set forth, and also by virtue of certain acts of the Congress of the United States, and by the General Assembly of the State of Ohio, under and by virtue of certain agreements entered into by and between the United States and the State of Ohio, as hereinafter set forth. That between the 23d day of February, 1820, and the 8th day of February, 1825, the General Assembly of the State of Ohio presented to the Senate and House of Representatives of the United States memorials and resolutions in which were set forth the advantgages which the United States would derive from the construction of certain canals, and particularly the Ohio canal, extending from the Ohio river at the mouth of the Scioto river to Lake Erie, and requesting the Congress of the United States to grant to the State of Ohio aid in the construction of said canal and extensions thereof, which might thereafter be made.

And thereupon, in response to said resolutions and memorials, on the 24th day of May, 1828, the Congress of the United States passed an act entitled "An act to aid the State of Ohio in extending
43 the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in the construction of said canals authorized by law," the fifth section of which act is in the words and figures following, to wit:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the State of Ohio, five hundred thousand acres of the land owned by the United States, within the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, created by said State in the con-

struction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extension of canals now making; which lands, when selected, shall be disposed of by the legislature of Ohio, for that purpose and no other: Provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same: And provided further, that the said canals, already commenced shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales, shall not be affected by that failure."

It was further provided by the seventh section of the said act that "said act shall take effect provided the legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions
44 thereof; and unless such expression of assent be made, this act shall be wholly inoperative."

And thereupon, in pursuance of said act of Congress, on the 22d day of December, A. D. 1828, the General Assembly of the State of Ohio assented to the several provisions and conditions of said act; which said act is in the words and figures following, to wit:

"An act declaring the assent of the State of Ohio to the provisions and conditions of an act of Congress." (See page 319.)

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the assent of the State of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty-eight, and entitled, 'An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas Territory.'

"EDWARD KING,
"*Speaker of the House of Representatives.*
"SAMUEL WHEELER,
"*Speaker of the Senate.*

"December 22d, 1828."

That in pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the State of Ohio, the State of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said
45 act hereinbefore set forth, and has from time to time sold and disposed of the same, and has received from the proceeds of such sale upwards of the sum of $2,200,000. That at the

time of the passage of the several acts above mentioned, the Ohio canal, extending from the mouth of the Scioto river through the State of Ohio to Lake Erie, was then located and in process of construction, with its various branches and extensions, which said canal passed through the village of Carroll, in said county of Fairfield. And that afterwards, on the date hereinbefore mentioned, the said Lancaster Lateral canal was purchased by the State of Ohio for the sum of $61,241, the said sum being paid to the said Lancaster Lateral Canal Company by the board of public works, in pursuance of said act, out of the canal funds belonging to the State of Ohio, derived from and created by the sale of the lands granted by the United States, as hereinbefore set forth.

Afterwards, to wit, on March 7, 1836, the General Assembly of Ohio, by an act passed on that date, authorized the canal commissioners of the board of public works of the said State, to extend the said Lateral canal from its terminus in the town of Lancaster, to the town of Athens, in Athens county; and the said commissioners were, by the said act, authorized to borrow on the credit of the State of Ohio $350,000, for the purpose of constructing said canal; and afterwards the said commissioners were authorized, by an act of the General Assembly, to borrow the additional sum of $300,000, for the purpose of completing the said canal between the points aforesaid.

The plaintiff further says, that the said canal so authorized to be constructed, was completed and opened as a continuous line
46 of canal for navigation purposes, on and prior to the first day of January, 1842. The entire purchase price of said Lateral canal, above described, and the continuation thereof from Lancaster to Athens, as well as the loan above referred to, made for the purpose of constructing said canal, was paid out of the canal fund of the State of Ohio, which said fund was, in part at least, created by the proceeds of the sale of said lands granted to the State of Ohio as hereinbefore stated. And thereupon the said canal was constructed by the State of Ohio and became and was, and ever since has been, an extension and continuation of the Ohio canal from the village of Carroll to its termination in the said county of Athens.

The plaintiff further says, that ever since the construction of said canal, which is and has been known as the Hocking canal, the same has been, and still is, a public highway, which has been used for the use of the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress, and of the General Assembly of the State of Ohio, hereinbefore set forth.

Plaintiff further says, that said canal cuts off from plaintiff's said land all the drainage from lands lying east therefrom, and the waters falling upon said lands east of plaintiff, as aforesaid, all run and flow into said canal, and plaintiff has provided for the drainage of all the water falling upon his said lands by means of tile drains, as before mentioned.

Plaintiff further says that the abandonment of the canal and the construction of said railroad will place increased burdens upon his

said lands; will subject his said lands to the flow of waters
47 from the east, which since the year 1836 have been intercepted by said canal, and subject them to overflow and render them unfit for the purposes of cultivation and greatly less valuable.

The plaintiff further says that the said act under which the said defendant claims the right to enter upon and take possession of the said canal, and to construct and operate a railroad thereon, passed May 18, 1894, confers no authority, power, or right upon said defendant to enter upon said lands and to use the same for the purposes of building and operating a railroad, or for any other purpose.

Plaintiff says that the said act is null and void, for the following reasons:

1. Because the said act conflicts with section 10, article 1, of the Constitution of the United States, which provides that "No State shall pass any bill impairing the obligation of contracts."

2. Because said act conflicts with section 28, article 2, of the constitution of the State of Ohio, which provides that "The General Assembly shall have no power to pass laws impairing the obligation of contracts."

3. Because said act conflicts with article 13, section 1, of the constitution of the State of Ohio, which prohibits the legislature from passing any special act conferring corporate powers.

4. Because said act conflicts with section 16, article 2, of the constitution of the State of Ohio, which provides, that "No bill shall contain more than one subject which shall be clearly expressed in the title."

5. The plaintiff further says that the said Hocking canal was at the time of said grant, and now is, worth at least from $600,000 to $700,000 for the purposes of the right of way for the construc-
48 tion of a railroad. That at the time of the passage of said act, the legislature of Ohio had before it a proposition from another railroad company duly incorporated under the laws of this State, having a larger capital and greater responsibility than the defendant, and which proposed to use said canal for the construction of a railway exactly as proposed by the defendant and proposed to construct the railroad in a much shorter space of time; the sum so offered by said other company being $5,000 a year larger than that for which said right of way was granted to the defendant, and at the same time it was proposed to the legislature that if such property was offered to competitive bidding the said other corporation would bid for the same an annual rental upon the basis of a valuation of $500,000.

6. The plaintiff further says that while the grant to the defendant of said canal as hereinbefore stated, was in form a lease thereof, yet in substance and in fact it was a donation of the greater part of said property to the said defendant for its own private purposes. That said act is null and void because it is against public policy, and against the rights and interests of the people of Ohio, and it is not within the grant of legislative power given to the General Assembly by the provisions of article 2 of the constitution of Ohio.

7. The plaintiff further says that the Lancaster Lateral Canal Company, which constructed the part of said Ohio canal between Carroll and Lancaster, acquired only the easement for the purposes of navigation along and over the lands through which said canal was located and constructed, and that by the conveyance of that part of the said property by said company to the State of Ohio, the State of Ohio only acquired the same right and interest in
49 and to that portion of the said canal which the said Lancaster Lateral Canal Company had at the time of its said conveyance.

8. The plaintiff further says that as the said grant made by the said act of the General Assembly of May 18, 1894, purports to convey a greater title than the State had in the said canal property, and also attempts to confer upon said defendant the right to use the said property for purposes other and different from that for which the State had the right to use the same, the said grant is excessive and greater than the General Assembly of Ohio had the power to convey and therefore void.

The plaintiff further says that the said defendant is about to comply with the terms and provisions of the said act of the General Assembly of date of May 18, 1894, and has already given bond to the State of Ohio, as provided for in said act, and the said defendant has made payment of the money provided to be paid by the said defendant in said act, and the said defendant is also unlawfully making preparations to build, maintain and operate said railroad upon said line and upon said canal, and for this purpose it is unlawfully and without authority threatening to take possession of said canal and all said property and fixtures connected therewith for the sole purpose of building, maintaining and operating a railroad thereon for all time to come, which, if consummated, will constitute a permanent injury and destruction of plaintiff's property and rights; that the said defendant, by the destruction of said canal, will irreparably injure the lands of plaintiff, hereinbefore set forth, and will destroy the value of the drainage system which said plaintiff has constructed upon his land, and will also place
50 very large additional burdens upon said plaintiff's lands, and great and irreparable injury will be done the plaintiff in the premises, unless the defendant is restrained from taking possession of said canal and constructing the railroad thereon.

The said plaintiff, therefore, prays the court here, that the said defendant may be enjoined from entering upon said canal property and taking possession of the same, and from doing any of the acts which are now threatened by the said defendant in the premises, and especially that the said act of the General Assembly of Ohio of date May 18, 1894, under which the said defendant claims to be acting, may be declared by the court to be null and void, and that upon a final hearing the plaintiff may have a perpetual injunction restraining the defendant from doing any and all the acts herein complained of, and for all other and proper relief in the premises.

The facts by which each of the others are distinguished, will be noticed in the opinion. Briefly they may be stated as follows:

Shotwell claims a contract with the State for the use of water from the canal with which to sprinkle the streets of Logan, and which he claims the act violates.

Wright claims a contract with the State to enlarge and forever maintain a dam across the Hocking river at a point above his grist mill, near Logan, so as to furnish a sufficient supply of water both for the canal and his grist mill.

Walsh claims to own land on both sides of and adjoining what was known as the Lancaster Lateral canal, now a part of the Hocking canal. That, as to this part of the Hocking canal, the State has simply an easement in the property. That on the abandon-
51 ment of the canal, through his premises, the land reverted to him, and that the State has no power to lease or grant it to others, or place additional burthens upon it. In this respect his claim is similar to Vought's.

The cases were appealed to the circuit court, and there submitted on the demurrer to the petition in each case. The court sustained the demurrer and dismissed each case. The action of the court in this regard is assigned for error.

R. A. Harrison, J. B. Foraker, T. E. Powell, and *D. J. Ryan,* for plaintiffs in error.

The act is unconstitutional and void, because it conflicts with section 1 of article 13, of the constitution of Ohio, which provides: "The General Assembly shall pass no special act conferring corporate power."

This provision has been construed by our supreme court to mean:

First. No corporation shall be created by special act.

Second. Corporate powers shall not be conferred upon any corporation created under the general laws by special act.

Third. No additional corporate power shall be conferred upon a corporation created under the general laws by a special act of the General Assembly.

While it is true that the Columbus, Hocking Valley & Athens Railroad Company was incorporated under the general laws of this State, still if any additional corporate power has been conferred upon it by this special act, then such act is in conflict with the above constitutional provision, and void.

52 This act confers upon this railroad company the exclusive right to use and operate a railroad over this public highway.

In the case of *Railroad Company v. Railroad Company,* 36 Ohio St., 239, it was held that a municipal corporation could not confer upon a street railroad the exclusive right to the use of the streets.

This act enlarges the corporate power of this railroad company in three respects:

First. It grants to this corporation the right to acquire and operate a railroad by lease alone.

Second. It confers upon this corporation the power to divert a public highway from the purposes for which it was originally constructed, and to *to* use it, exclusively for purposes entirely different.

Third. It grants to this corporation the exclusive right to use and control this highway, a power which the legislature cannot confer upon any corporation whatever. If the Hocking canal had remained a public highway for navigation purposes, the legislature of Ohio could not confer upon any corporation the exclusive right to operate boats over the line of the canal, thereby giving it a monopoly of the transportation business.

The following authorities are relied upon to support our proposition that this act confers corporate power. *Atkinson et al. v. M. & C. R. R. Co.*, 15 Ohio St., 21; *State ex rel. v. Cincinnati*, 20 Ohio St., 18; *State ex rel. v. Cincinnati*, 23 Ohio St., 445; *State v. Mitchell*, 31 Ohio St., 592; *State v. Constantine*, 42 Ohio St., 442; *State v. Pugh*, 43 Ohio St., 98; *State v. Anderson*, 44 Ohio St., 248; *Commissioners v. State ex rel. Brockmann*, 50 Ohio St., 653; *City v. Spring Valley Water Works*, 48 Cal., 509.

The act in question violates section 10 of article 1, of the
53 Constitution of the United States, which ordains that "No State shall pass any bill impairing the obligation of contracts."

The act of Congress approved May 24, 1828, by which the United States then granted to the State of Ohio 500,000 acres of the lands owned by the United States within the State, for the purpose and upon the conditions in the act contained, and the act of the General Assembly of Ohio passed December 22, 1828, declaring the assent of the State of Ohio to the provisions and conditions of said act of Congress, constitute a contract.

A grant is an executed contract. If a law is in its nature a contract and rights have become established thereunder, it cannot be repealed. *Fletcher v. Peck*, 6 Cranch, 88.

A compact between the United States and States to secure rights of way to carry United States mails, was construed in *Searight v. Stokes*, 3 How., 151; and *Neil v. Ohio, id.*, 720.

In 1831 this State passed an act proposing, with the assent of Congress, to take under its care that portion of the Cumberland road within its limits, and to apply the tolls to the repair of the road, and containing a proviso exempting toll for the passage of any stage or coach conveying the property of the United States and persons in its service. Congress passed a law assenting to this act.

In 1831, Pennsylvania, about two months after the passage of the law of Ohio, passed an act similar.

In 1836 the legislature of Pennsylvania passed an act imposing a toll upon carriages carrying the mail of the United States over that part of the Cumberland road within the State. The court held this act to be in conflict with the compact between the State and the United States arising from said act of 1835, under which the
54 State took possession of the road. *McGhee v. Mathis*, 4 Wall., 143; *Lake Superior R. R. Co. v. United States*, 3 Otto, 442; *Green v. Biddle*, 8 Wheaton, 1; *State ex rel. v. Railway Co.*, 37 Ohio St., 153.

A contract of a State with another State, or with an individual, whether it assumes the form of a grant or not, is a contract within

the prohibition of the Constitution of the United States. *New Jersey v. Wilson*, 7 Cranch, 164; *Fletcher v. Peck*, 6 *id.*, 87; *Winter v. Jones*, 10 Georgia, 190; *Adams v. Hackett*, 7 Foster, 294; *Providence Bank v. Billings*, 4 Pet., 560; *Woodruff v. Trapnall*, 10 How., 190; *Wabash, etc., Co. v. Beers*, 2 Black, 448.

It is now quite settled that the clause as to the constitutional inviolability of contracts. is to be construed by itself, so far, at least, that there is no contract which a State law can effect which is not within the constitutional prohibition. Hence a contract between two States, or a contract between a State and an individual, is a contract within the sense of this clause and for the purpose of protecting its inviolability. *De Witt v. Harvey*, 4 Gray, 499. The threatened action of the defendant will disturb the vested rights of the plaintiff as alleged in his petition. *Street Railway v. Cumminsville*, 14 Ohio St., 523; *Roberts v. Easton*, 19 Ohio St., 78; *Railway Co. v. Lawrence*, 38 Ohio St., 41.

An injunction will be granted for the protection of an easement or a servitude in water, and an easement in water, acquired by prescription, is as absolute as any other right, and equity will restrain its violation when such violation is productive of any serious injury. *Hulme v. Shreve*, 3 Green (N. J.), Ch., 116; *Repley v. Welsh*, 23 Cal., 452; *Sheboygan v. S. R. R. Co.*, 21 Wis., 667; *Owen v. Field*, 12 Allen, 357; *Wilcox v. Wheeler*, 47 N. H., 488.

55 An injunction is the only remedy by which, in such cases as this, the property-owner cannot obtain the protection guaranteed to him by section 19 of the "bill of rights" of this State.

The act providing for the abandonment of the Hocking canal and the leasing of the same for railroad purposes is invalid, null and void, as claimed in plaintiff's petition, for the reason that the legislature purports to grant a greater title in the Hocking canal to the grantee than the State of Ohio possesses.

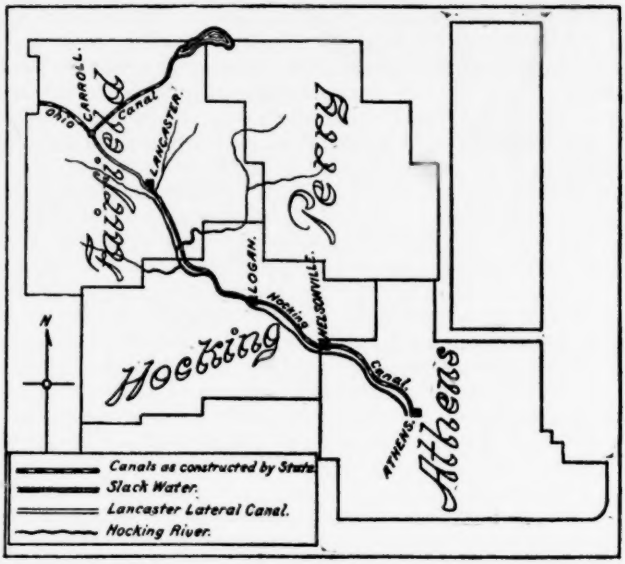
The title to the State of Ohio in that part of the Hocking canal between Carroll and Lancaster, is not a title in fee-simple, as is the title to the remainder of the canal property of Ohio, including the remaining portions of the Hocking canal beyond Lancaster, it is simply an easement for canal purposes, under the different acts pleaded in the plaintiff's petition.

The State of Ohio came into possession of that part of the Hocking canal which lies between Carroll and Lancaster, by purchase from the Lancaster Lateral Canal Company, a private corporation which constructed the canal under the authority of its charter as received from the Ohio legislature.

The State of Ohio, under an act entitled "An act to provide for the general improvement of the State of Ohio by navigable canals," passed February 4, 1825 (see 2 Chase, page 1475, section 8), constructed the general canal system of the State, and under said act had authority to take land by purchase or gift, and also to appropriate land that was necessary in the construction and maintenance of said canal system. The title to all land appropriated

56 under this act which vested in the State of Ohio, was expressly provided by that statute to be a fee-simple title.

Map Showing Lancaster Lateral and Hocking Canals.



But the title which the State of Ohio acquired in that part of the Hocking canal which lies between Carroll and Lancaster, is an entirely different title from that which it acquired in lands appropriated under the general canal act of 1825. (See volume 24, Ohio Laws, 71.) By this act of incorporation, the Lancaster Lateral Canal Company was constituted and declared a body corporate and politic "for the purpose of making a navigable canal from the town of Lancaster to such point of the Ohio canal as shall be found most eligible." *Oregon R'y & Nav. Co. v. The Oregonian R'y Co., Limited.* (See 130 U. S., page 1.)

57 Afterwards, to wit, March 9, 1838, by authority of an act entitled "An act to authorize the board of public works to purchase for the use of the State of Ohio, the Lancaster Lateral canal," said Lancaster Lateral canal was purchased by the State of Ohio, and, thereupon, became in fact and in law a part and parcel of what is now known as the Hocking canal, and is embraced in the act of abandonment in question.

The act of incorporation of the Lancaster Lateral Canal Company specially provided that the title which this company should have in lands which they appropriated for the purpose of constructing their canal should be "to the extent and for the purpose set forth in or contemplated by this act." This question has been determined in Ohio. The Warren County Canal Company incorporated by a special act of the legislature, February 22, 1830. Volume 28, Ohio

Laws, 124, and volume 34, Ohio Laws, 135, *Corwin v. Cowan*, 12 Ohio St., 629.

When the State of Ohio abandoned the part of the Hocking canal which it had originally secured from the Lancaster Lateral Canal Company as it does by the first section of the act in question, it ceases to have any further title in said property.

Where the State has no title to the thing granted, the grant is absolutely void. *Polk's Lessee v. Wendell et al.*, 5 Wheat. Rep., 293.

Legislative grants are not warranties, and the rule of the common law must be applied to them, that no estate passes to the grantee except what was in the grantor at the time. *Rice v. Railroad Company*, 1 Black's Report, U. S. Supreme Court.

Where the State makes a grant and purports to give a
58 greater title than she possesses, the grant is void. This doctrine prevails from the common law wherein grants from the Crown can be avoided in three ways: (1) Where the grant professes to give a greater estate than it possessed in the subject-matter of the grant; (2) where the same estate, or part of the same estate, has already been granted to another; and (3) where the Crown has been deceived in the consideration expressed in the grant. Am. and Eng. Ency. of Law, vol. 9, page 45, "Grants."

A purchaser from the State takes such title as the State is authorized to convey. *Webster v. Clear*, 49 Ohio St., 392; *New Orleans v. United States*, 10 Pet., 731; *Governeur's Heirs v. Robertson*, 11 Wheat., 332.

The grant of this property to the defendant for the use and purpose of a railroad being void, as we claim, for the reason that the legislature has no right to make such a grant, the plaintiff may appeal to the court by injunction to preserve his rights where such alleged grant would interfere with them. *Le Clercq et al. v. Trustees of Gallipolis*, 7 Ohio, 221; *Reynolds' Widow v. Commissioners of Stark County*, 5 Ohio, 204; Cooley on Con. Lim., 211.

How this grant should be construed: *Slidell v. Granjean*, 111 U. S., 437; *Charles River Bridge v. Warren*, 11 Pet., 420; *Dubuque & Pacific R. R. Co. v. Litchfield*, 23 How., 66; The Delaware R. R. Tax, 18 Wall., 206.

Public grants are to be construed strictly, not extended by implication. *Jackson v. Lamphire*, 3 Pet., 280; *Beaty v. Knowler*, 4 Pet., 152; *Providence Bank v. Billings*, 4 Pet., 514; *United States v. Arredondo*, 6 Pet., 736.

Grants to corporations are to be construed strictly against
59 the corporation and in favor of the public. *Rice v. R. R. Co.*, 1 Black, U. S., 359.

D. L. Sleeper, Selwyn N. Owen, C. H. Grosvenor, and *John J. Stoddart* for defendant in error.

1. The State has the right to abandon any portion of her canals, and to authorize a change of use from one to another of a like kind, and that property used for canal purposes, by consent of the legislature, may be used for railroad purposes, both being public highways for the transportation of persons and property, and dif-

fering only in the method of transportation. *Fox v. Cincinnati*, 104 U. S., 783; *Hatch v. Railroad Co.*, 18 Ohio St., 92; *Hubbard v. Toledo*, 21 Ohio St., 379; *Malone v. Toledo*, 28 Ohio St., 643; *Elevator Co. v. Cincinnati*, 30 Ohio St., 629; *Fox v. Cincinnati*, 33 Ohio St., 492; *Fauger v. Board of Public Works*, 42 Ohio St., 607; *Canal Co. v. Commissioners*, 27 Ohio St., 14; *McComb v. Stewart*, 40 Ohio St., 647; *People v. Kerr*, 27 N. Y.; Cooley's Const. Lim., 554; *Bret v. Wabash & Erie Canal Co.*, 25 Ind., 409; *Tuckahoe Canal Co. v. Tuckahoe Railroad Co.*, 11 Leigh, 42; Cooley's Const. Lim., 102, 104, 105, 216 and 218; Cook on Stocks, 923; Wood on Railroads, 937; 34 Maryland, 463; *Rexford v. Knight*, 10 N. Y., 308; *Halderman v. R'y Co.*, 50 Pa. St., 425; *Craig v. Mayor*, 53 Pa. St., 427; *Robinson v. Company*, 72 Pa. St., 316; *Mason v. Company*, 9 Bassell (U. S.), 239; *Nelson v. Fleming*, 56 Ind., 310; *Waterworks v. Burkhart*, 41 Ind., 364; *State v. Company*, 37 Ohio St., 174; *State v. Snook*, 53 Ohio St., 521; *State v. Pennsylvania Co.*, 53 Ohio St., 189; *Richards v. Cincinnati*, 31 Ohio St., 506.

If an additional burden has been placed upon the premises of the plaintiffs, Walsh and Vought, by the building of the railroad
60 instead of the canal, they have an ample remedy at law, and could proceed under section 6448 of the Revised Statutes of Ohio, to compel such appropriation and payment. A court of chancery will not interfere by injunction when there is an ample remedy at law. 10 Am. & Eng. Ency. of Law, 783; *Glenn v. Fowler*, 8 Gill and J. (Md.), 340; *Hulse v. Wright*, Wright's Rep., 61; *McComb v. Stewart*, 40 Ohio St., 663.

2. The contract does not impair the obligation of any contract between the State and nation, or between the State and any of its citizens.

We have no difference with counsel for plaintiffs in error upon the decisions quoted in their brief as to the binding force of agreements between the national and State governments such as that in 3 Howard, 151. Those cases decide as to the effect of grants with a proviso and acceptance, as between the two governments—the parties to the contract. In the case at bar neither of the parties to the contract are complaining. The complaint here comes from one who complains because the parties to the contract are satisfied, and his complaint is not for their benefit but solely for his own private benefit.

The statutes conferring upon the agents of the State the power to grant the privilege to use the surplus water of the canal only conferred the power to so contract for its use for hydraulic purposes, it did not confer the authority to have the water for sprinkling purposes. Laws of 1841, page 74; *The State ex rel., etc., v. Railway Co.*, 37 Ohio St., 174.

Mr. Wright nowhere directly alleges that the agents of the State agreed that water should forever be taken from the canal to run the mill. If, however, such agreement had been made it would
61 not be binding on the State, because such agreement would likewise have been beyond the power of the State's agents. *Elevator Co. v. Cincinnati*, 30 Ohio St., 630.

The abandonment of her public canals, by the State, creates no liability on her part to respond in damages resulting therefrom to parties holding leases of "surplus water" under the act of March 23, 1840. *Hubbard v. City of Toledo*, 21 Ohio St., 379; *Cooper v. Williams*, 4 Ohio, 253; *Buckingham v. Smith*, 10 Ohio, 288; *Fox v. Cincinnati*, 33 Ohio St., 492, affirmed in 104 U. S., 783; *State ex rel. v. Board Public Works*, 42 Ohio St., 615; *Erkenbrecher v. Cincinnati*, 2 C. S. C. R., 412; *Haldoman v. Pa. R. R. Co.*, 50 Pa. St., 440.

3. The act does not confer corporate powers; but if it did and is a general law it is still valid.

The act purports to grant to the defendant the right, franchise, and privilege of constructing, maintaining, and operating over and along the Hocking canal and the property of the State of Ohio, adjacent thereto, a railroad, with single or double tracks, side tracks, switches, bridges, stations, and other structures usual and incidental to the operation of a railroad, and to the successors and assigns of the defendant for the term of ninety-nine years renewable forever, for the consideration named in the act.

Beyond these provisions no power is granted that an individual may not exercise. Surely the power to pay $50,000 down and $10,000 annual rental is not a corporate power. Anybody who has the money can do that without resolving himself or themselves into a corporation or assuming corporate powers or franchises.

We must not forget that the defendant was a railroad cor-
62 poration when the State first began to deal with it. We must not forget that every pretended power which the act purports to grant to it was already possessed by it. *Sims v. Street Railroad Co.*, 37 Ohio St., 556; *Commissioners v. Rosche Bros.*, 50 Ohio St., 103.

4. That section 16 of article II, of the State constitution, which provides that "no bill shall contain more than one subject," is directory merely, and its violation does not vitiate the act. *State ex rel. v. Covington*, 29 Ohio St., 102; *Pim v. Nicholson*, 6 Ohio St., 176; *Miller v. State*, 3 Ohio St., 475.

5. That it is the sole province of the legislature to determine the value of the property of the State, and the adequacy of the consideration therefor, and its acts in that regard are not proper subjects for judicial review.

The court will not inquire into the motives of the legislature, or whether an act is just or unjust, politic or impolitic, provident or improvident. Cooley Const. Lim., 220; *Wire Co. v. Brown*, 64 Ia., 275; *Probasco v. Raine*, 50 Ohio St., 378.

The long line of decisions above referred to clearly establishes the doctrine that the legislature has full and ample power to abandon her canals and authorize their use for street or railway purposes. This question has become "*stare decisis.*" *Dugan v. Campbell*, 1 Ohio, 119; *Smith v. Harmoning*, 42 Ohio St., 254; *Kearney v. Buttles*, 1 Ohio St., 362.

6. The title of the State in the portion of the canal acquired from the Lancaster Lateral Canal Company is not an easement for transportation by canal only, but is a fee title held for the general pur-

poses of a public highway for transportation and commerce. 23 Ohio Laws, 56, section 8; *Ohio ex rel. v. Railway Co.*, 53 Ohio St., 243; *State of Ohio v. Snook et al.*, 53 Ohio St., 531.

63 Beginning with the 5 Ohio, 115, and ending with the 53 Ohio St., 521, the general trend of the decisions has been in the direction of the principles announced in the last case. No other conclusion could logically follow. There can be no distinction made between a strip of land acquired upon which to build a portion of the canal system and a strip of land acquired for a portion of the same system upon which a canal has been already built. The object of the acquisition is the same in both cases. The thing ultimately produced is the same, namely, an addition to the canal system. *Rexford v. Knight*, 11 N. Y., 308; *Halterman v. Penn. R. R. Co.*, 50 Pa. St., 425; *Craig v. Mayor*, 53 Pa. St., 477; *Robinson v. Penn. R. R. Co.*, 72 Pa. St., 316; *Mason v. Lake Erie, etc., R'y Co.*, 9 Biss. (U. S.), 239; *Nelson v. Flemming*, 56 Ind., 310; *Water Works Co. v. Burkhart et al.*, 41 Ind., 364.

A land-owner alleging that the land was taken and held wrongfully without his consent and against his protest has his only remedy for the land taken and for injury to his other land under section 6448, Revised Statutes (69 Ohio Laws, 88), to compel an appropriation. *Hatry v. P. & Y. R'y Co. et al.*, I. C. C., 428.

Where, however, the highway is occupied by the company under an agreement with the public authorities having control of it, the owner may compel the institution of proceedings for its condemnation under section 6448, Revised Statutes. *Railroad Company v. Robbins*, 35 Ohio St., 531; *Railroad Company v. Williams, supra; Railroad Company v. O'Harra*, 48 Ohio St., 353.

7. That the allegations of the petition inconsistent with, or controverted by law, are not admitted to be true by the demurrer,

64 and that the 5th, 6th, 7th and 8th propositions in the plaintiff's general statement are not merely questions of fact. *State v. Archibald*, 52 Ohio St., 1.

The plaintiffs have no vested rights growing out of advantages arising from the fact that the canal joins their lands.

Our claim is that no citizen had the right to go upon the State property within the lines of the right of way of the canal or to use any part of the State's property within this line, for individual use or for private purposes, that the statutes of this State prohibited everything from trespassing on said property, by penal statutes in force ever since the canal had been in existence. *White v. Ohio*, 14 Ohio, 468; Revised Statutes, sections 218–'70.

The privilege granted to any private citizen was merely a matter subservient to the use for which the right of way was originally acquired and was only by sufferance.

Canals do not come under the terms "ways" or "public lands." *State ex rel v. Railway Co.*, 37 Ohio St., 175.

It has been decided by this court that two classes of benefits inure from the construction of the canal, "general and accidental." *Cooper et al. v. Williams*, 4 Ohio, 253.

This decision has been notice for many years, that no vested

rights could be acquired in any of the matters mentioned in the decision. *Buckingham v. Smith et al.*, 10 Ohio, 288.

There can be no claim for damages on account of the loss of the convenience of watering farm stock at the canal. *Hatch v. Railroad Company*, 18 Ohio St., 122.

MINSHALL, *J.*:

The grounds on which the act in question is claimed to be
65 unconstitutional are stated in the answer. They are, 1. That it is a special act conferring corporate power. 2. It impairs the obligation of contracts. 3. It contains more than one subject of legislation. It is sufficient to say in regard to the latter, that it has been permanently settled by the decisions of this court, that the provisions of the constitution on which this objection is placed, is directory and not mandatory; and that a law cannot be held invalid because it contains more than one subject of legislation.

With regard to the first ground: If this act were the only source of the company's authority to be a corporation and construct a railroad, the validity of the act might well be questioned. The company, however, is one organized under the general laws of the State, and has the same corporate powers and franchises, possessed by railroad corporations in general. Hence, its corporate powers and franchises are not conferred on it by this act; they are derived from the general law; and the provisions of the act in this regard are superfluous and cannot of themselves impair the validity of the act. As a railroad corporation it possessed, by general law, the power to build a railroad between the termini named, and to acquire by purchase or condemnation a right of way for its road, and other property necessary for its operation; and if it were competent to the State to abandon its canal and dispose of it to any purchaser, as has been frequently held, it was competent to the company to purchase it for the uses of its road. The transaction authorized by the law was simply an abandonment of the Hocking canal by the State, and the disposition of it to an existing railroad corporation for a consideration agreed on. The fact that the State through its
66 legislature saw fit to deal with this company rather than some other one, or did not offer the property at a competitive bidding, or might have made a better bargain, cannot affect the validity of the law. Such matters must necessarily be left to the discretion of the legislatare, acting for the State in the disposition of its property. There is no constitutional provision limiting its power in this regard. For its wisdom and integrity in exercising this power, the legislature is responsible to the people and not to the courts.

The case of the *City and County of San Francisco v. Water Works Co.*, 48 Cal., 493, is cited to show that the act in question here confers corporate power. This we think is not the case. The grant there was of an easement in the streets of a city. The court held, and properly, that the State had no proprietary interest in the streets of a city dedicated to public use; that such a grant was the grant of a franchise, which could not be made by a special act. Here, how-

ever, the State was the proprietor of the Hocking canal, and could, as it did, grant it, not as a franchise, but as property of which it was the owner.

It is also contended that the act confers a power on the defendant to lease a railroad not conferred on other roads under like circumstances. It is a sufficient answer to this to say, that the power conferred is not to lease a *railroad*, but to lease *land* for the purpose of a railroad in process of construction; and this any company may do in acquiring its right of way. The State has no railroad to lease, it has simply land for such purpose. The company by the lease does not obtain the control of a competitor, it can, at most, become a competitor of another road; and the provision for leasing is,
67 therefore, neither within the letter nor spirit of the law regulating the leasing of one road by another.

We come now to the question, Does this law, as claimed, impair the obligation of contracts? As a first instance of this, it is claimed that it violates a contract of the State with the General Government. The facts are stated in detail in the petition. From these it appears that the General Government in 1828 donated 500,000 acres of land to aid the State in the construction of its canals. A portion of the proceeds of these lands were used in constructing the Hocking canal. By the act making the donation, the terms of which were accepted by the State, it was provided that "the said canals, when completed or used, shall be and forever remain public highways, for the use of the Government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same." It will be observed that the provision does not in terms oblige the State to keep up and maintain the canals for all time. The obligation is limited to the time "when completed or *used*." To require them to be kept up for all time, irrespective of their utility, would be unreasonable, and could not have been intended by the parties. It must certainly have been contemplated that, in course of time, the canals might become useless, as they have, for the purposes of commerce and navigation. The contract, as all others, must be given a reasonable construction. If such contingencies were not contemplated, yet an exception to the obligation would be created by the law of reason, and the State might abandon them without violating its contract with the United States. The
68 reasonable construction of the language then is, that, since the State is not by express language bound to keep up the canals for all time, so long as they are kept up and *used*, the obligation in favor of the General Government shall be observed; and when they cease to be kept up or *used*, the obligation ceases. This must have been the implicit understanding of the parties at the time; and therefore the State does not by this act impair the obligation of its contract with the General Government. But a more decisive answer to this contention is, we think, that none of these parties show that they were in any way parties to the agreement between the State and the United States, or that it was made for their benefit. They cannot insist that the contract of the State with

the United States shall be maintained for their benefit. The United States has not heretofore made, nor is it now making, any objection, and it would seem time enough to consider the matter when it does. Wright, one of the plaintiffs, says he made the improvements on his mill with reference to the contract, though there is not a word in the contract of his predecessor, Worthington, from whom he claims to derive his rights, in respect to the matter. But what legal right has any one to make investments on the faith of a contract between others and to which he is not a party or privy and insist for that reason that the contract shall be observed by either of the parties? We see none.

We pass now to a brief notice of the special facts of the several cases. Wright insists that the abandonment of the canal will impair the obligation of a contract made between the State and his predecessor in title, Thomas Worthington, to whose rights he has
69 succeeded; and which was made at the time the canal was constructed. Worthington then owned a grist-mill located on the Hocking river, which was supplied with water from the river by a dam constructed on it. That in consideration of his granting the State the right to construct the canal through the river and his lands and to appropriate the water to the use of the canal, the State agreed to enlarge and forever maintain the dam across the river above the mill, so as to afford an ample supply of water both for the canal and the mill. He does not and cannot, claim any title in the canal or its lands. This part of the canal was constructed under the act of 1825 whereby the State took a fee-simple in all the lands appropriated by it for the use of its canals. *State ex rel. v. Railway Co.*, 53 Ohio St., 189, 243; *State of Ohio v. Snook et al.*, 53 Ohio St., 121; *Malone v. Toledo*, 34 Ohio St., 541. Whether the obligation of this contract is one that runs with the land in favor of a purchaser of Worthington, or was simply personal and did not accompany the land in the ownership of others, or whether it appears, from the facts alleged, that he will be injured by the vacation of the canal, or in such an obligation as must end with the abandonment of the canal, (*Hubbard v. Toledo*, 21 Ohio St., 379; *Fox v. Cincinnati*, 33 *id.*, 492,) need not be determined in this case. His remedy would be in damages for the breach of the contract and not to enjoin the company from entering upon the lands purchased from the State, and in which he has no interest. His remedy, if any, is saved to him by the provision in the statute, that "the company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State harmless from all loss or damages resulting to such
70 property-holders by reason of the construction and operation of said railroad."

What has just been said applies with equal, if not greater, reason to the claim of Shotwell. It is certainly settled by the decisions just cited, that a contract made by the State through its board of public works with an individual for the use of the water of any of its canals for a period of years, terminates with the use of the canal, and that it is under no obligation to keep up the canal for such purpose, after

the canal has become useless for the purpose of navigation and has been abandoned. The agents of the State have no power to make such a contract in the name of the State or to bind it thereby.

It is claimed by some of the plaintiffs that they have interests in the canal as abutting property-holders, and that they cannot be deprived of these rights without compensation, and may enjoin the company from taking possession of the lands until their interests have been condemned and paid for by appropriation proceedings. The company is enjoined by the statute from interfering with the vested rights of abutting owners, until compensation has been made. It does not, however, define what these vested rights are. Manifestly to be vested, they must be such as are recognized by law, as property of an individual that could be enforced against the State. If the right does not exist as against the State, it does not as against the company. *Fox v. Cincinnati*, 33 Ohio St., 492, 502. The claim of these parties is based upon the decision in *Street Railway Co. v. Cummingsville*, 14 Ohio St., 523. That was the case of a street that the company was about to occupy with its track, and two of the defendants in error were
71 abutting property-holders on the street; and it was held that they had such rights in the street for the purposes of ingress and egress as could not be taken until paid for. But the owner of property abutting on a canal has not the same, nor a similar, interest in it, that an owner of property abutting on a highway or street has. The owner of property abutting on a street or highway has, for the purposes of access to his property a direct and not an incidental interest in the street. It is one of the purposes for which the street was established. But an owner of property abutting on a canal has no such interest in the canal. Such benefits as he may derive from it in the way of water, drainage, etc., are accidental and the fact that he is an abutting owner confers no right on him to insist that the canal shall be kept up and maintained to secure him in the enjoyment of such advantages; and can maintain no action to prevent the canal from being abandoned. This is well settled by the decisions in this State, and seems well sustained by reason and the analogies of the law. In general, one owner can claim no right to such advantages as he may enjoy from the manner in which an adjacent owner may, for the time being, occupy and use his own property. Hence, the claim of Vought, that he cannot be deprived of the use of the canal as a means of drainage for his farm, until compensation has been made him for the benefit thus conferred on his land, though he has put in many miles of tiling with reference to the canal as a means of drainage, cannot be sustained.

Finally it is claimed by Vought and Walsh that the portion of the canal on which their lands are situate was formerly owned and constructed by the Lancaster Lateral Canal Co., a private
72 corporation organized under an act of the legislature in 1826 (24 Ohio Laws, 71). That under an act of the legislature, the State purchased the canal of this company in 1838, and it then became a part of the Hocking canal. That by the terms of the act under which the Lateral Company was organized it only took an

easement in the lands taken by it for canal purposes, and that the State by the purchase acquired no other or greater title than the company had to convey; and hence that on the abandonment of this part of the canal the land reverts to the owners of the freehold. The question here presented seems settled by the previous decisions of this court. In *Corwin v. Cowan*, 12 Ohio St., 629, the question arose as to the title to the Warren County canal, after it had been abandoned by the State. The canal had been constructed, as in this case, by a private corporation, organized under an act of the legislature, and was afterwards purchased by the State and made a part of its canal system under an act of the legislature. The company had been authorized by its charter to enter upon, take and use such lands as might be necessary for the location and construction of its canal. The court held, that the act authorizing the purchase of the canal was prospective in its nature and did not affect the locations and appropriations of lands which had previously been made by the canal company, and that the easement which the company had acquired by location and appropriation, passed to the State under the act without being enlarged into a fee-simple estate in the lands so appropriated; and further that upon the abandonment of the canal by the State, the easement terminated, and the right to the possession of the lands constituting the line of the canal reverted to the
73 owners of the freehold. A similar question arose in the case of *McComb v. Stewart*, 40 Ohio St., 647, and it is there said, page 665, "Whether the property taken is paid for in money or in accruing benefits and advantages, it should clearly appear by the terms of the act that it was the legislative intent to take a fee before such effect can be given to it. In the absence of express words, a fee will not be deemed to be taken where the purposes of the act will be satisfied with the taking of an easement." Citing *Washington Cemetery v. Railroad Co.*, 68 N. Y., 591. The judge then quotes from Cooley as follows: "In any case an easement only would be taken, unless the statute plainly contemplated and provided for the appropriation of a larger interest." Const. Lim., 559.

A careful consideration of the act under which the Lateral Company acquired its lands for canal purposes, fails to disclose any purpose whatever to authorize it to acquire a fee-simple therein. It is provided in section 8 of the act that it should be lawful for the directors "to enter upon and take possession of lands, etc., necessary to make said canal," and in case the lands are not *given* or *granted*, and they are unable to agree with the owner, to appropriate the same. When appropriated they are to take a complete title to the premises to the extent and for the purposes set forth in and contemplated by the act. The purpose contemplated by the act is the use of the land for canal purposes so long as the canal is maintained. So that when the use ends the title, they were permitted to take, ends; for it is not a title in fee-simple they are permitted to take, but a *complete* one for the uses and purposes of the canal. The company
74 could not then when the use ends sell them to others, on the contrary the lands must revert to the owner of the freehold. And, as held in *Corwin v. Cowan*, the State took no greater estate in

the lands than the company had to convey, the result is the same, on their abandonment by the State for canal purposes, as if the company had continued to use them to the time of the abandonment.

What has just been said relates, however, to the simple abandonment of a canal, as in the case of *Corwin v. Cowan, supra.* Where, however, as in this case, the abandonment of a canal is made as part of a transaction by which the easement is conveyed by the owner for a similar use—as for the purposes of a railroad—the original easement in the lands is not extinguished, but passes to the purchaser, who takes it subject to the duty of making compensation to the owner of the freehold for the additional burthen imposed on the land, and such damages as may result to him from the new use. *Hatch v. Railroad Co.*, 18 Ohio St., 92, 122. In this case the canal, by an agreement between the canal company and the railroad company, had been acquired and taken possession of by the latter company; and on the claim of the plaintiff, a land-owner, the court said: "The plaintiff was entitled to compensation from the railroad company for the full value of such land as it may have taken from him not embraced in the appropriation made by the canal company; and for such additional burdens as may have been imposed on the lands covered by the original appropriation; and for damage done or accruing to his adjacent lands, by reason of the additional burthen, if any, and of the change of structure and of use from those of a canal to those of a railroad, in so far as such damages are
75 peculiar to himself as a proprietor, and not common to the public at large. As the owner of land, subject to a perpetual easement, but appropriated and paid for only for the purposes of a canal, he had rights which the railroad company cannot be permitted to ignore; and which, we think, it ought to have instituted proceedings regularly, under the statute, to condemn and pay for, before it ventured to divert the easement to uses so varient from those originally intended. But this not having been done, and the plaintiff having resorted to this action for compensation, the rights of the parties are governed by the same principles which would have been applicable in such a proceeding." The principles of this case have never been disturbed, and may be regarded as the settled law of the State. It settles the rights of the parties in the cases of Vought and Walsh, and the rules by which compensation and damages are to be awarded to each of them, in a proceeding by the railroad company to condemn their lands.

The court then is of the opinion that the judgment in the case of Wright, and also in the case of Shotwell should be affirmed; and that the judgment in the case of Vought and in that of Walsh should be reversed; and judgment rendered in favor of each enjoining the railroad company from entering upon the lands of either, until condemned and paid for according to law.

Judgment in each case accordingly.

Burket, J., dissents as to the 5th paragraph *fo* the syllabus.

76 In the Supreme Court of Ohio.

I hereby certify that the foregoing is a full and true copy of the decision of the supreme court of Ohio, delivered in the cases of Michael S. Vought *vs.* The Columbus, Hocking Valley & Athens R. R. Co., John J. Walsh *vs.* The Columbus, Hocking Valley & Athens R. R. Co., and Robert Wright *vs.* The Columbus, Hocking Valley & Athens R. R. Co., all of said three cases having been heard and decided together, and there being but one opinion in all of said cases, of which the foregoing is a full and true copy taken from the original in my possession.

E. O. RANDALL,
Reporter of the Supreme Court.

77 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of the plea which is in the said supreme court of the State of Ohio, before you, being the highest court of law or equity in the said State in which a decision *sh*ould be had in the said suit between John J. Walsh and The Columbus, Hocking Valley & Athens Railroad Company, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the laws of the United States and to the Constitution of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said John J. Walsh, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, within thirty days from the date thereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct
78 that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. C. C., S. D. O.,
By ROB'T C. GEORGI, *Deputy.*

Allowed and approved by me—

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of Ohio.

79 [Endorsed:] John J. Walsh *vs.* C., H. V. & A. R. R. Co. Writ of error.

80 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Columbus, Hocking Valley & Athens Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio wherein John J. Walsh is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. T. Spear, chief justice of the supreme court of the State of Ohio, this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

Service by copy of the above citation is hereby acknowledged this 19th day of May, A. D. 1898.

SELWYN N. OWEN,
Attorney and of Counsel for the Defendant in Error.

81 [Endorsed:] John J. Walsh *vs.* C., H. V. & A. R. R. Co. Citation.

82 *Assignment of Errors.*

Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-eight.

JOHN J. WALSH, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said John J. Walsh, by Joseph B. Foraker, Richard A. Harrison, Daniel J. Ryan, and Thomas E. Powell, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

The supreme court of the State of Ohio erred in holding and deciding that the act of the General Assembly of the State of Ohio passed May 18, 1894, entitled "An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company," is not in violation of nor repugnant to the Constitution of the United States, and that the said act does not impair the obligation of contracts in either of the particulars as claimed by the said plaintiff in error.

83 Said supreme court of the State of Ohio erred in deciding and holding that the said act of the General Assembly of the State of Ohio passed May 18, 1894, was and is valid and binding upon said plaintiff in error.

And the said John J. Walsh prays that the judgment aforesaid of the supreme court of the State of Ohio may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by reason of the said judgment.

R. A. HARRISON,
J. B. FORAKER,
T. E. POWELL, AND
D. J. RYAN,
Attorneys for Plaintiff in Error.

84 [Endorsed:] John J. Walsh *vs.* C., H. V. & A. R. R. Co. Assignment of errors.

[Endorsed:] Supreme court of Ohio. John J. Walsh *vs.* The Columbus, Hocking Valley and Athens Railroad Co. No. 5622. Certified transcript.

Endorsed on cover: Case No. 16,901. Ohio supreme court. Term No., 316. John J. Walsh, plaintiff in error, *vs.* The Columbus, Hocking Valley and Athens Railroad Company. Filed June 9th, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 353.

ROBERT WRIGHT, PLAINTIFF IN ERROR,

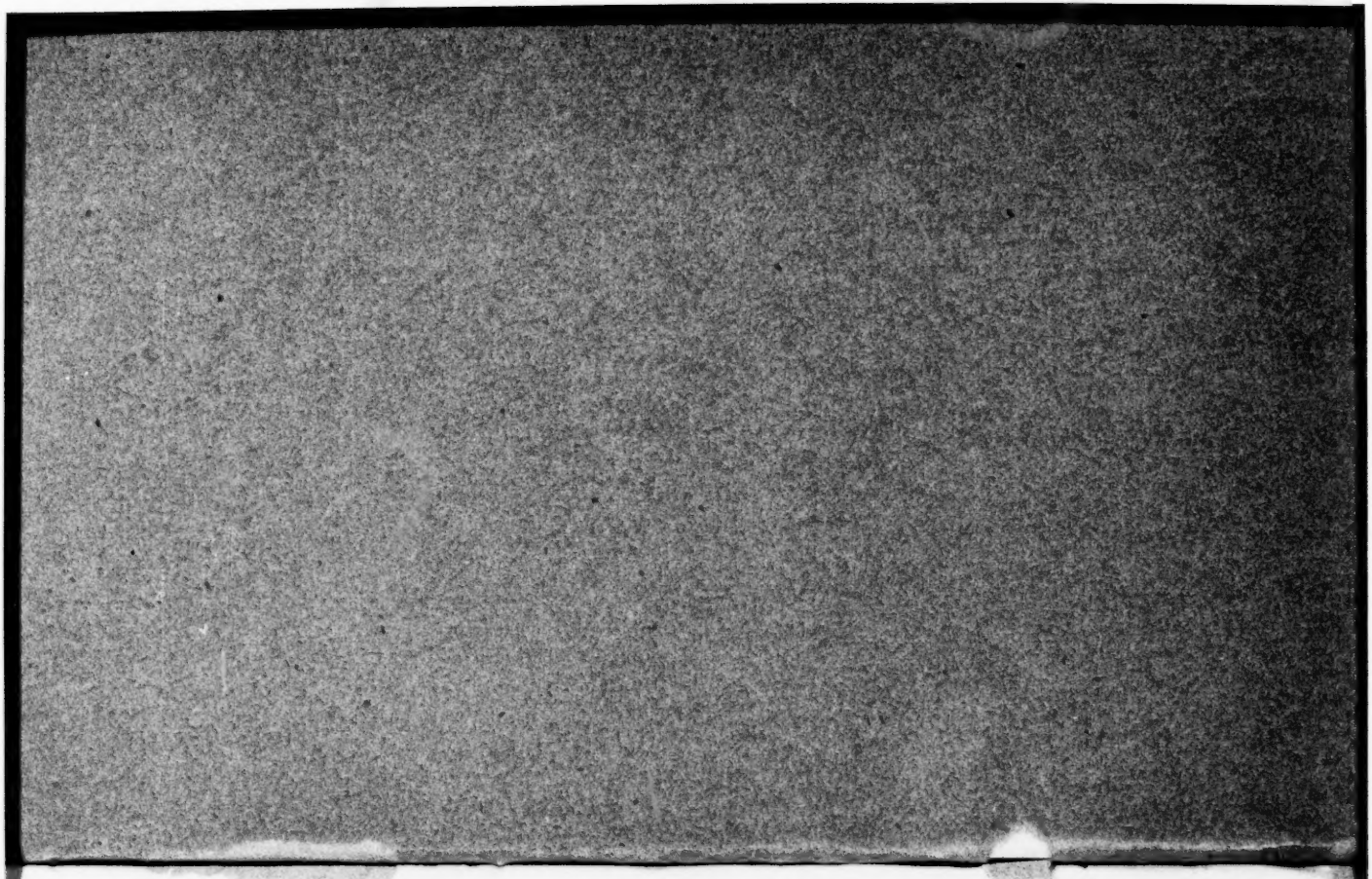
vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED OCTOBER 24, 1895.

(16,902.)



(16,902.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 317.

ROBERT WRIGHT, PLAINTIFF IN ERROR,

vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1898.

1–4 Supreme Court of Ohio.

ROBERT WRIGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILroad Company, Defendant in Error. } No. 5623.

Record.

In error to the circuit court of Franklin county.

R. A. Harrison, T. E. Powell, J. B. Foraker, D. J. Ryan, attorneys for plaintiff in error.
D. L. Sleeper, attorney for defendant in error.

Filed Aug. 4, 1897. Supreme court Ohio.
J. B. ALLEN, *Clerk.*

5 Supreme Court of Ohio.

ROBERT WRIGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILroad Company, Defendant in Error. } No. 5623.

Petition in Error.

(Filed June 25, 1897.)

The said Robert Wright, plaintiff in error, complains of The Columbus, Hocking Valley and Athens Railroad Company, defendant in error, and says:

That at the January term, A. D. 1897, of the circuit court in and for Franklin county, Ohio, to wit: on the 2d day of April, A. D. 1897, the defendant in error recovered a judgment against the plaintiff in error in a certain action then pending in said court, wherein the said plaintiff in error was plaintiff and the defendant in error was defendant, together with the costs of suit; a certified copy of the journal entries in said action, together with the original papers therein, is herewith filed.

Plaintiff in error avers that there is error in said judgment, proceedings, and record in this, to wit:

1. Said circuit court erred in sustaining the demurrer of the defendant to the plaintiff's petition.

6 2. Said court erred in dismissing the plaintiff's petition in said cause.

3. Said court erred in rendering judgment against the plaintiff for the costs of said action.

Wherefore, the plaintiff in error prays that said judgment of the

circuit court be reversed and that the plaintiff in error may be restored to all things he has lost by reason thereof.

R. A. HARRISON,
T. E. POWELL,
J. B. FORAKER,
D. J. RYAN,
Attorneys for Plaintiff in Error.

The defendant in error hereby waives the issue and service of summons in error in the above-entitled cause and enters the appearance of the defendant in error herein.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD CO.,
By D. L. SLEEPER,
Attorney for Defendant in Error.

7 *Transcript of Docket and Journal Entries.*

In the Circuit Court.

(Filed June 25, 1897.)

1895, April 22.—Appeal bond filed.
1895, April 22.—Transcript, journal entries filed.
1895, April 22.—Original papers filed.
1897, April 2.—Plaintiff's demurrer sustained. Defendant to recover costs of plaintiff. Exceptions by plaintiff. 4-595.

January Term, April 2, 1897.

This day came the parties and thereupon this cause came on to be heard on the demurrer filed by the defendant herein to the petition of the plaintiff, and was argued by counsel and submitted to the court; on consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended. To all of which orders, judgments and decrees the plaintiff by his counsel excepts.
(Duly certified.)

8 In the Circuit Court, Franklin County, Ohio.

ROBERT WRIGHT, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILWAY, Defendant. } No. 1080.

Entry.

(Filed April 2, 1897.)

This day came the parties and thereupon this cause came on to be

heard on the demurrer filed by the defendant herein to the petition of the plaintiff and was argued by counsel and submitted to the court;

On consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing, and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended.

To all of which orders, judgments and decrees the plaintiff by his counsel excepts.

9 *Transcript of Journal Entries.*

In the Court of Common Pleas.

(Filed April 22, 1895.)

I, Charles F. Galloway, clerk of the court of common pleas, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

1894, July 5.—Petition, affidavit and precipe filed. Summons issued to sheriff of Franklin county, Ohio. Returned July 16. Answer August 4, 1894. Copy of petition, $5.50.

1894, July 17.—Precipe filed. Alias summons issued to sheriff of Franklin county, O. Returned July 30. Answer August 18, 1894.

1894, July 30.—Motion of defendant filed.

1894, October 13.—Motion to strike out, filed by defendant. Motion to make definite filed by defendant.

1895, January 2.—Motion for trial filed by plaintiff.

1895, March 23.—Motion sustained. Leave to plaintiff to amend petition by April 6, 1895. 91–477.

1895, April 20.—Amendment to petition filed by consent. Copy amendment to petition 70c. Demurrer of defendant filed by consent. Judgment for costs *vs.* plaintiff. Notice of appeal bond fixed at $100.00. 93–297.

1895, April 22.—Appeal bond filed.

January Term, March 23, 1895.

This cause came on to be heard on the motion of the defendant to require the plaintiff to make his petition more definite and
10 certain, and was argued by counsel and submitted to the court; on consideration whereof, the court adjudged said motion well taken and sustained the same and ordered the plaintiff to amend his petition by stating with whom said contract was made to build and maintain said dam, and said plaintiff is given until April 6, 1895, to file said amendment.

April Term, April 20, 1895.

This cause came on to be heard upon the petition of the plaintiff and the amendment thereto and the demurrer of the plaintiff herein

filed. The court on consideration thereof, sustains the same to which — excepted, and thereupon the plaintiff failing to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff his costs herein expended, and the plaintiff giving notice of his intention to appeal this case to the circuit court, the court directs that the appeal bond be made payable to the defendant in the sum of $100.00.

(Duly certified.)

11 Court of Common Pleas, Franklin County, Ohio.

ROBERT WRIGHT, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY, Defendant.

Petition.

(Filed June 5, 1894.)

The said plaintiff says that he is a resident of the county of Hocking, and a citizen and tax-payer of the State of Ohio; that he is now, and for many years past has been the owner in fee-simple of a certain tract of land, situated in Falls township, in the county of Hocking, and bounded and described as follows:

Part of section No. ten (10), township fourteen (14), of range No. seventeen (17), beginning at a post at the intersection of the McArthurstown road and the south boundary line of said section No. ten (10), from which a black oak fourteen inches in diameter bears south eighty-seven degrees, west twenty-three and one-half (23½) links; thence north six degrees, west four (4) chains and thirty-two (32) links to a post in said road; thence north eighteen (18) degrees, east six (6) chains and seventy-seven (77) links to a post from which the southeast corner of a house bears north nineteen (19) degrees, east one hundred and fifty (150) links; thence north fifty-four and three-fourths (54¾) degrees, west two (2) chains and fifty-four
12 (54) links to a post in the forks of the road, from which a gum fourteen (14) inches in diameter bears north ten and one-half (10½) degrees, east one hundred and eighteen (118) links; thence north across the dam ten (10) chains and six (6) links to the center of the Hocking canal; thence with the canal north seventy-three and one-half (73½) degrees, east three (3) chains and seventy-four (74) links to a stake; thence north eighty-eight (88) degrees, east six (6) chains; thence south eighty-nine (89) degrees, east ten (10) chains and thirty (30) links; thence south eighty (80) degrees, east three chains and seventy-four (74) links to the center of the culvert and the canal; thence south ten (10) degrees, west seventy-eight (78) links; thence south eighteen (18) degrees, west three (3) chains and fifty (50) links to a point in the run; thence south forty-nine and one-half (49½) degrees, east two (2) chains and forty-one links to a sycamore on the north bank of the Hocking river; thence south twenty-five (25) degrees, west twelve chains and twenty (20)

links to a post in the corner of a meadow; thence south fifty-seven and one-half (57½) degrees, west four (4) chains and fifty links; thence south fifty-nine (59) degrees, west six (6) chains and eighteen (18) links to a post in the section line; thence with said line west nine (9) chains and eighteen links to the beginning, containing forty-four (44) acres more or less.

That many years ago the State of Ohio, through certain aid granted to the State by the United States, and by virtue of a certain contract entered into between the United States and the State of Ohio, which is hereafter more fully set forth, acquired the right to make a canal through the said lands, the same being an extension of the Ohio canal and known and commonly called the Hocking canal, which said canal passes along and through the lands of the plaintiff above described.

13 Plaintiff further says that the said Hocking canal which runs through the land as above stated, extends from the village of Carroll, in the county of Fairfield, and from the Hocking canal, through the counties of Fairfield and Athens, to the village of Nelsonville, in the said last-named county; and that the same has since its construction been a part of the canal system of the State of Ohio, and an extension of the Ohio canal, and the State of Ohio is the owner and in possession of said canal, which is now in use for navigation and other purposes hereinafter set forth.

Plaintiff further says that he is also owner of a certain mill located on said lands on the south side of said Hocking canal which is now and for many years past has been run and operated by water power supplied by said Hocking canal, and as hereinafter more fully set forth.

Plaintiff further says, that the said defendant, The Columbus, Hocking Valley and Athens Railroad Company, on the 12th day of April, 1894, filed with the secretary of state its articles of incorporation in said name, which articles of incorporation were then and there duly recorded, and that the principal office of said company, fixed by said articles, is at the city of Columbus, in the county of Franklin, in said State. Said corporation was organized for the purpose of building and operating a railroad from the city of Columbus, in the county of Franklin, and extending through the counties of Franklin, Fairfield, Hocking and Athens, to the city of Athens, all in the State of Ohio, the said corporation being authorized to exercise such powers, rights, privileges and franchises only as are provided for and conferred by the general laws of the State of Ohio, regulating the organization and incorporation of railroad companies.

14 Plaintiff further says that the said defendant, since the 18th day of May, 1894, has been and still is claiming the right, privilege and franchise of entering upon, taking possession of and controlling the Hocking canal, above described, especially that portion extending through the lands of plaintiff, above described, including all the property, rights, interests and appurtenances connected with said Hocking canal, between the points above named. The said defendant claims the right, privilege and franchise of taking possession, of

controlling said property and constructing and operating a railroad along and over the said canal, by virtue of an act of the General Assembly of the State of Ohio, passed on the 18th day of May, A. D. 1894. Said act is in words and figures following, to wit:

S. B. An act No. 315.

To provide for the abandonment of the Hocking canal for canal purposes and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking canal, from its junction with the Ohio canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise, and privilege of constructing, maintaining and operating over, upon and along the Hocking canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks,
15 switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said installment of fifty thousand dollars shall be paid into the State treasury before the construction of said railroad is begun, and for the remaining installments of rental the State of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges, and other structures erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of State, the secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive
16 right during the term aforesaid to use and occupy the prop-

erty aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property-holders by reason of the construction and operation of said railroad. Provided that when said railroad, its successors and assigns cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

LEONIDAS H. SOUTHARD,
Speaker pro Tem. of the House of Representatives.
ANDREW L. HARRIS,
President of the Senate.

Passed May 18th, 1894.

The said Hocking Canal property, above described, was acquired by the State of Ohio, and the said canal was constructed under and by virtue of certain acts of the Congress of the United States, and of the General Assembly of the State of Ohio, and under and
17 by virtue of certain agreements entered into by and between the United States and the State of Ohio, as hereinafter set forth. That between the 23d day of February, 1820, and the 8th day of February, 1825, the General Assembly of the State of Ohio presented to the Senate and House of Representatives of the United States, memorials and resolutions in which *was* set forth the advantages which the United States would derive from the construction of certain canals, and particularly the Ohio canal, extending from the Ohio river at the mouth of the Scioto river, to Lake Erie, and requesting the Congress of the United States to grant to the State of Ohio aid in the construction of said canal and extensions thereof, which might afterwards be made.

And thereupon, in response to said resolutions and memorials, on the 24th day of May, 1828, the Congress of the United States passed an act entitled "An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in the construction of said canals authorized by law;" the fifth section of which act is in the words and figures following:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the State of Ohio, five hundred thousand acres of the land owned by the United States, within the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore

been, or which may hereafter be, contracted by said State in the construction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extension of canals now making; which land, when selected, shall be disposed of by the legislature of
18 Ohio, for that purpose and no other: Provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same; and provided further, that the said canals, already commenced shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales, shall not be affected by that failure."

It is further provided by the seventh section of the said act that "said act shall take effect provided the legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions thereof; and unless such expression of assent be made, this act shall be wholly inoperative."

And thereupon, in pursuance of said act of Congress, on the 22d day of December, A. D. 1828, the General Assembly of the State of Ohio assented to the several provisions and conditions of said act; which said act is in the words and figures following, to wit:

"An act declaring the assent of the State of Ohio to the provisions and conditions of an act of Congress."

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the assent of the State of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty-eight, and entitled 'An act to aid the State of Ohio in extending the Miami
19 canal from Dayton to Lake Erie, and to grant a quantity of land to said State, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas Territory.'

"EDWARD KING,
"*Speaker of the House of Representatives.*
"SAMUEL WHEELER,
"*Speaker of the Senate.*

"December 22d, 1828."

That in pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the State of Ohio, the State of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said act hereinbefore set forth, and has from time to time sold and disposed of

the same, and has received from the proceeds of such sale upwards of the sum of $2,200,000. That at the time of the passage of the several acts above mentioned, the Ohio canal, extending from the mouth of the Scioto river through the State of Ohio to Lake Erie, was then located and in process of construction, with its various branches and extensions, which said canal passed through the village of Carroll, in said county of Fairfield.

That afterwards, to wit: on the 8th day of February, A. D. 1826, (Ohio Laws, vol. 24, page 71,) the Lancaster Lateral Canal Company was incorporated by an act of the General Assembly of the State of Ohio, and authorized to construct and operate a canal extending from the village of Carroll to the town of Lancaster, in the county of Fairfield, connecting with the Ohio canal at the said village of Carroll.

And thereupon the said company so incorporated did con-
20 struct and operate the said canal between the points aforesaid until the 22d day of December, A. D. 1838, when the said Lancaster Lateral Canal Company sold and conveyed the said canal, between the said points, to the State of Ohio, the said purchase being made by the board of public works, by authority conferred upon the said board by an act of the General Assembly of the State of Ohio, passed March 9th, 1838. And thereupon, by deed of December 22d, 1838, the said Lancaster Lateral Canal Company, by deed of that date, conveyed the said canal and all its rights, interests, appurtenances and fixtures connected therewith, to the State of Ohio for the sum of $61,241, the said sum being paid to the said company by the board of public works, in pursuance of said act, out of the canal fund belonging to the State of Ohio, created by the sale of the lands granted by the United States, as hereinbefore set forth.

Afterwards, to wit, on March 7th, 1836, the General Assembly of the State of Ohio, by an act passed on that date, authorized the canal commissioners of the board of public works of the said State, to extend the said Lateral canal from its terminus in the town of Lancaster, to the town of Athens, in Athens county; and the said commissioners were, by the act, authorized to borrow on the credit of the State of Ohio $350,000, for the purpose of constructing the said canal; and afterwards the said commissioners were authorized, by an act of the General Assembly, to borrow the additional sum of $300,000, for the purpose of completing the said canal between the points aforesaid.

The plaintiff further says, that the said canal so authorized to be constructed, was completed and opened as a continuous line of canal for navigation purposes, on and prior to the first day of January,
1842. The entire purchase price of said Lateral canal, above
21 described, and the continuation thereof from Lancaster to Athens, as well as the loan above referred to, made for the purpose of constructing said canal, was paid out of the canal fund of the State of Ohio, which said fund was, in part at least, created by the proceeds of the sale of said lands granted to the State of Ohio as hereinbefore stated. And thereupon the said canal was

constructed by the State of Ohio and became and was, and ever since has been, an extension and continuation of the Ohio canal from the village of Carroll to its termination in the said county of Athens.

The plaintiff further says, that ever since the construction of said canal, which is and has been known as the Hocking canal, the same has been, and still is, a public highway, which has been used for the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress and of the General Assembly of the State of Ohio, hereinbefore set forth.

Plaintiff further says, that the said grist-mill, located upon the lands above described, was originally constructed before the location and construction of the said Hocking canal, and the same was run and operatod by water power from the Hocking river until the canal was located and constructed, as hereinbefore stated. That at the time the said Hocking canal was located and constructed along and through the lands above described, it became necessary to appropriate the Hocking river, and the water power which had been used to supply said grist-mill, for the purposes of said canal.

That at said time one Thomas Worthington was the proprietor of said lands and the said grist-mill. And thereupon a contract was entered into by and between the said Thomas Worthington
22 and the State of Ohio, through its duly authorized agents, by which, in consideration of the granting to the State the right to construct said canal through said lands and appropriate the water of the Hocking river for the purpose of supplying said canal, the State of Ohio agreed with said Thomas Worthington to so enlarge and forever maintain the dam across the Hocking river above the said grist-mill, as to afford ample supply of water both for said canal and said grist-mill. And thereupon in pursuance of said agreement the said dam was so enlarged as to afford sufficient supply of water both for said canal and said grist-mill. That some two miles west of the said grist-mill the said canal ran directly into the Hocking river, and became a part thereof, and from said point to a short distance northwest of the said grist-mill the said canal continued in the bed of the Hocking river. That a short distance north of the said grist-mill the said canal again left the Hocking river, the canal passing to the north of said grist-mill and the Hocking river to the south, leaving the grist-mill between the two, and supplied by water power both from the canal and the river, under the arrangement made, as hereinbefore stated.

Plaintiff further says, that the said canal was constructed as aforesaid, and the said dam was built under and in pursuance of the terms of the said agreement entered into by and between the State of Ohio and the said Thomas Worthington. And that in pursuance of said contract all the water power necessary to run and operate the said grist-mill, has been supplied from the said canal and Hocking river, up to the present time.

Plaintiff further says, that he is the owner in fee-simple of the lands, tenements and rights described hereinbefore, by a direct

23 and connected chain of title from the said Thomas Worthington, and that plaintiff has ever since been and still is owner thereof, and all appurtenances, and that the said grist-mill has now been supplied, run and operated by water power from the said Hocking river and said canal, from the date of the construction of said canal down to the present time, a period of *of* about fifty-seven years.

Plaintiff further says, that relying upon the said contract made with the State, as aforesaid, and upon its faithful execution on the part of the State, he has from time to time repaired and improved the said grist mill and put the same in excellent condition so that the same is now very profitable, doing a large business and is very valuable, and the plaintiff is deriving therefrom large profits.

Plaintiff further says, that if the said defendant is permitted to enter upon said canal and construct its railroad thereon the water power which now operates said mill will be cut off and destroyed and the value of said property will be so affected and impaired as to render the same of very little or no value.

The plaintiff further says, that in addition to the lands and tenements, hereinbefore described, he is also the owner of and in possession of large tracts of land extending along both sides of said canal for a long distance east of the town of Logan, Hocking county. That said lands extend for a distance of over a mile east of the said town of Logan, and that the aggregate number of acres of said lands is over 1,000 acres.

Plaintiff further says, that a highway runs through and along said lands, which runs along and near the Hocking canal almost the entire length or distance through said lands. That there are also cross-highways, making easy access to and egress from all portions of said lands. The said lands are all in a high state

24 of cultivation and are now being actually cultivated by plaintiff, who is in possession thereof. He says that the construction of said railroad along and upon said canal, will place increased burdens upon his said lands, will cut off and destroy his access to the different parts of the lands by and through the highways running through the same, as hereinbefore stated, and will render his access to and egress from different portions of his lands very difficult and inconvenient, and great additional burdens will be placed upon his said lands by reason of the change from a canal to a railroad, and he will be deprived of water privileges for his stock upon said land.

The plaintiff further says that the said act under which the said defendant claims the right to enter upon and take possession of the said canal, and to construct and operate a railroad thereon, passed on the 18th day of May, 1894, and commonly known as the Earnhart act, confers no authority, power, or right upon said defendant to enter upon said lands or to use the same for the purpose of building and operating a railroad, or for any other purpose whatever.

Plaintiff says that the said act is null and void, for the following reasons:

1. Because the said act conflicts with section 10, article 1, of the Constitution of the United States, which provides that " no State shall pass any bill impairing the obligation of contracts."

2. Because said act conflicts with section 28, article 2, of the constitution of the State of Ohio, which provides "The General Assembly shall have no power to pass laws impairing the obligation of contracts."

3. Because said act conflicts with article 13, section 1, of the constitution of the State of Ohio, which prohibits the legislature from passing any special act conferring any corporate powers.

25 4. Because said act conflicts with section 16, article 2, of the constitution of the State of Ohio, which provides, " No bill shall contain more than one subject which shall be clearly expressed in the title."

5. The plaintiff further says that the said Hocking canal was at the time of said grant, and now is, worth at least from $600,000 to $700,000 for the purpose of the right of way for the construction of a railroad. That at the time of the passage of said act, the legislature of Ohio had before it a proposition from another railroad company duly incorporated under the laws of this State, having a larger capital and greater responsibility than the defendant, and which proposed to use said canal for the construction of a railway exactly as proposed by the defendant and proposed to construct the said railroad in a much shorter space of time ; the sum so offered by said other company being $5,000 a year larger than that for which said right of way was granted to the defendant, and at the same time it was proposed to the legislature that if such property was offered to competitive bidding the said other corporation would bid for the same an annual rental upon the basis of a valuation of $500,000.

6. The plaintiff further says that while the grant to the defendant of said canal, as hereinbefore stated, was in form a lease thereof, yet in substance and in fact it was a donation of the greater part of said property to the said defendant for its own private purposes ; that said act is null and void because it is against public policy, and against the rights and interests of the people of the State of Ohio, and it is not within the grant of legislative power given to the General Assembly by the provisions of article 2 of the constitution of Ohio.

7. The plaintiff further says, that the Lancaster Lateral Canal Company, which constructed the part of said Ohio canal be-

26 tween Carroll and Lancaster, acquired only the easement for the purposes of navigation along and over the lands through which said canal was located and constructed, and that by the conveyance of that part of the said property by said company to the State of Ohio, the State of Ohio only acquired the same right and interest in and to that portion of the said canal which the said Lancaster Lateral Canal Company had at the time of the said conveyance.

8. The plaintiff further says, that as the said grant made by the said act of the General Assembly of May 18th, 1894, purports to convey a greater title than the State had in the said canal property,

and also attempts to confer upon said defendant the right to use the said property for purposes other and different from that for which the State had the right to use the same, the said grant is excessive and greater than the General Assembly of Ohio had the power to convey, and therefore void.

Plaintiff further says that defendant is about to comply with the terms and provisions of the said act of the General Assembly of date May 18th, 1894; has already given bond to the State of Ohio, as provided for in said act, and has paid into the treasury of the State of Ohio the sum of fifty thousand dollars, as provided in said act, and said defendant is also unlawfully making preparations to build, maintain and operate said railroad on said lines and upon said canal, and for this purpose it is unlawfully and without authority threatening to take possession of said canal and all said property and fixtures connected therewith for the sole purpose of building, maintaining and operating a railroad thereon for all time to come, which, if consummated, will constitute a permanent trespass upon the plaintiff's property; that said defendant, by the destruction of said canal, will destroy the plaintiff's water
27 power which now supplies his grist mill, as hereinbefore stated, and will leave the plaintiff without any provision for the maintenance of the dam in the Hocking river, which now supplies the water power of said mill, and will particularly destroy the plaintiff's business, which is now very large and profitable, and will also place very large additional burdens upon plaintiff's lands by rendering his said farms inconvenient and difficult of access, and cut off his access to said highways now running through the same, and great and irreparable injury will be done to the plaintiff in the premises, unless the defendant is restrained by an order of this court, from taking possession of said canal and constructing a railroad thereon.

The said plaintiff, therefore, prays the court here, that the said defendant may be enjoined from entering upon the said canal property and taking possession of the same, and from constructing and operating a railroad thereon, and from doing any and all acts which are now threatened by said defendant in the premises, and especially that the said act of the General Assembly of Ohio of date May 18th, 1894, under which the said defendant claims to be acting, may be declared by the court to be null and void, and that upon the final hearing the plaintiff may have a perpetual injunction restraining the defendant from doing any and all the acts herein complained of, and for all other and proper relief in the premises.

ROBERT WRIGHT,
By WELDY & BUERHAUS,
W. P. PRICE,
DANIEL J. RYAN,
HARRISON, OLDS & HENDERSON,
POWELL, RICKETTS & BLACK,
J. B. FORAKER, AND
JNO. S. FRIESNER,
Attorneys for Plaintiff.

(Verification and certificate attached.)

28 *Certified Transcript of Docket and Journal Entries.*

THE STATE OF OHIO, } ss:
City of Columbus, }

In the Supreme Court of Ohio, January Term, A. D. 1898.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

ROBERT WRIGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND Athens Railroad Company, Defendant in Error.

5623. Error to the Circuit Court of Franklin County.

June 25, 1897.—Petition in error & waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers filed.
" 26, " Papers taken by D. J. Ryan.
Aug. 4, " " returned by D. J. Ryan.
" " " Printed record filed.
" 16, " Proof of service of printed record filed.
Sept. 30, " Motion by defendant to advance and notice filed.
Oct. 5, " Journal entry:

"Motion by defendant to advance cause No. 5623 on the general docket. Oral argument requested."

"Ordered by the court that said motion be, and the same is hereby, allowed, cause advanced, and briefs to be filed within rule. Oral argument noted."

Order Book No. 15, page 379.

Dec. 20, 1897.—Plaintiff's printed brief filed.
Mar. 22, 1898.—Journal entry:

"This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county, and was argued by counsel; on consideration whereof it is ordered and ad-
29 judged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed, and, it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

Ordered that a special mandate be sent the court of common pleas of Franklin county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the circuit court of Franklin county 'for entry.'"

Order Book No. 16, page 34.

Mar. 29, 1898.—Mandate issued.

April 29, 1898.—Journal entry:

"On motion of the said plaintiff in error, this court doth order that it be certified and made a part of the record in this case and of the judgment rendered herein by this court at the present term thereof, to wit, on the 22nd day of March, A. D. 1898, and of the entry thereof, that in the rendition of said judgment it became and was material to the case to determine whether an act of the General Assembly of the State of Ohio entitled 'An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company,' passed May 18th, 1894, and found in volume 91, page 327, of the Laws of Ohio, is a law of said State and was and is of binding force and validity against the said plaintiff in error, on the hearing of said cause, claimed and asked this court to hold that the said act is in violation of and repugnant to section 10 of article I of the Constitution of the United States, which ordains that 'No State shall pass any bill impairing the obligation of contracts;' and this court orders it to be further certified that this court decided and adjudged that said act passed by the General Assembly of Ohio as aforesaid was not in violation of nor repugnant to said section 10 of article I of the Constitution of the United States, and decided and adjudged that said act was and is valid and binding upon said plaintiff in error, and thereupon rendered said judgment, which is founded upon said decision of this court that said act was and is of binding force and validity against the said plaintiff in error; and this court further ordered a special mandate to carry said judgment into execution, as is shown by the entry heretofore made of said judgment and order; and it is fur-
30 ther ordered by this court to be certified that the question of the validity of said act of the General Assembly in the particular mentioned hereinabove was drawn in question on the hearing and decision of this case as being repugnant to said section 10 of article 1 of the Constitution of the United States, and that the decision of the court was in favor of the validity of said act as against the said plaintiff in error; and it is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had."

Order Book No. 16, page 75.

31 Supreme Court of Ohio.

THE STATE OF OHIO, }
City of Columbus, } ss:

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing are all the entries in cause No. 5623, Robert Wright *vs.* The Columbus, Hocking Valley and Athens Railroad Company, and are truly taken and correctly copied from the minute and order books of said court, and that the printed record hereto attached is a true copy of the printed

record filed in this cause in this court and used in the consideration of said cause by said court.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court this twelfth day of May, A. D. 1898.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk.*

32 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of the plea which is in the said supreme court of the State of Ohio, before you, being the highest court of law or equity in the said State in which a decision *sh*ould be had in the said suit between Robert Wright and The Columbus, Hocking Valley & Athens Railroad Company, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the laws of the United States and to the Constitution of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said Robert Wright, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct

33 that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. Circuit Court, S. D. O.,
By ROB'T C. GEORGI, *Dep.*

Allowed and approved by me—

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of Ohio.

34 [Endorsed:] Robert Wright *vs.* C., H. V. & A. R. R. Co. Writ of error.

35 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Columbus, Hocking Valley & Athens Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio wherein Robert Wright is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. T. Spear, chief justice of the supreme court of the State of Ohio, this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

Service by copy of the above citation is hereby acknowledged this 19th day of May, A. D. 1898.

SELWYN N. OWEN,
Of Counsel and Attorney for the Defendant in Error.

36 [Endorsed:] Robert Wright *vs.* C., H. V. & A. R. R. Co. Citation.

37 *Assignment of Errors.*

Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-eight.

ROBERT WRIGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Robert Wright, by Joseph B. Foraker, Richard A. Harrison, Daniel J. Ryan, and Thomas E. Powell, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

The supreme court of the State of Ohio erred in holding and deciding that the act of the General Assembly of the State of Ohio passed May 18, 1894, entitled "An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company," is not in violation of nor repugnant to the Constitution of

the United States, and that the said act does not impair the obligation of contracts in either of the particulars as claimed by the said plaintiff in error.

38 Said supreme court of the State of Ohio erred in deciding and holding that the said act of the General Assembly of the State of Ohio passed May 18, 1894, was and is valid and binding upon said plaintiff in error.

And the said Robert Wright prays that the judgment aforesaid of the supreme court of the State of Ohio may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by reason of the said judgment.

R. A. HARRISON,
J. B. FORAKER,
T. E. POWELL, AND
D. J. RYAN,
Attorneys for Plaintiff in Error.

39 [Endorsed:] Robert Wright *vs.* C., H. V. & A. R. R. Co. Assignment of errors.

[Endorsed:] Supreme court of Ohio. Robert Wright *vs.* The Columbus, Hocking Valley and Athens Railroad Co. No. 5623. Certified transcript.

Endorsed on cover: Case No. 16,902. Ohio supreme court. Term No., 317. Robert Wright, plaintiff in error, *vs.* The Columbus, Hocking Valley & Athens Railroad Company. Filed June 9, 1898.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 92.

MICHAEL S. VOUGHT, PLAINTIFF IN ERROR,

vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JUNE 9, 1898.

(16,903.)

(16,903.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 318.

MICHAEL S. VOUGHT, PLAINTIFF IN ERROR,

vs.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1898.

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1–4 Supreme Court of Ohio.

MICHAEL S. VOUGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILroad Company, Defendant in Error. } No. 5624.

Record.

In error to the circuit court of Franklin county.

R. A. Harrison, T. E. Powell, J. B. Foraker, D. J. Ryan, attorneys for plaintiff in error.
D. L. Sleeper, attorney for defendant in error.

Filed Aug. 4, 1897, in supreme court of Ohio.
J. B. ALLEN, *Clerk.*

5 Supreme Court of Ohio.

MICHAEL S. VOUGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILroad Company, Defendant in Error. } No. 5624.

Petition in Error.

(Filed June 25, 1897.)

The said Michael S. Vought, plaintiff in error, complains of The Columbus, Hocking Valley and Athens Railroad Company, defendant in error, and says:

That at the January term, A. D. 1897, of the circuit court in and for Franklin county, Ohio, to wit: on the 2d day of April, A. D. 1897, the defendant in error recovered a judgment by the consideration of said court against the plaintiff in error in a certain action then pending in said court, wherein the said plaintiff in error was plaintiff and the defendant in error was defendant, together with the costs of suit; a certified copy of the journal entries in said action, together with the original papers therein, is herewith filed.

Plaintiff in error avers that there is error in said judgment, proceedings, and record in this, to wit:

1. Said circuit court erred in sustaining the demurrer of the defendant to the plaintiff's petition.

6 2. Said court erred in dismissing the plaintiff's petition in said cause.

3. Said court erred in rendering judgment against the plaintiff for the costs of said action.

Wherefore, the plaintiff in error prays that said judgment of the

circuit court be reversed and that the plaintiff in error may be restored to all things he has lost by reason thereof.

R. A. HARRISON,
T. E. POWELL,
J. B. FORAKER,
D. J. RYAN,
Attorneys for Plaintiff in Error.

The defendant in error hereby waives the issue and service of summons in error in the above-entitled cause and enters the appearance of the defendant in error herein.

THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD CO.,
By D. L. SLEEPER,
Attorney for Defendant in Error.

7 *Transcript of Docket and Journal Entries.*

In the Circuit Court.

(Filed June 25, 1897.)

1895, April 10.—Appeal bond filed by plaintiff.
1895, April 10.—Transcript, journal entries filed.
1895, April 10.—Original papers filed.
1897, April 2.—Defendant's demurrer sustained. Defendant to recover costs of plaintiff. Exceptions by plaintiff. 4–595.

January Term, April 2, 1897.

This day came the parties and thereupon this cause came on to be heard upon the demurrer filed by the defendant herein to the petition of the plaintiff, and was argued by counsel and submitted to the court; on consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended. To all of which orders, judgments and decrees the plaintiff by his counsel excepts.
(Duly certified.)

8 In the Circuit Court, Franklin County, Ohio.

MICHAEL S. VOUGHT, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILWAY, Defendant. } No. 1069.

Entry.

(Filed April 2, 1897.)

This day came the parties and thereupon this cause came on to be heard on the demurrer filed by the defendant herein to the petition

of the plaintiff and was argued by counsel and submitted to the court;

On consideration whereof, and being fully advised in the premises, the court does find that said demurrer is well taken and does sustain the same. And thereupon the plaintiff failing, and not desiring to plead further, it is considered by the court that the defendant go hence without day and recover from the plaintiff its costs herein expended.

To all of which orders, judgments and decrees the plaintiff by his counsel excepts.

9 *Transcript of Journal Entries.*

In the Court of Common Pleas.

(Filed April 10, 1895.)

I, Charles F. Galloway, clerk of the court of common pleas, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

1894, July 18.—Petition, affidavit and precipe filed. Summons issued to sheriff of Franklin county, Ohio. Returned July 30. Answer August 18, 1894. Copy of petition, $7.45.

1894, October 13.—Motion to strike out, filed by defendant.

1895, March 23.—Demurrer of defendant filed.

1895, March 23.—Motion overruled. Demurrer sustained. Petition dismissed at plaintiff's cost. Notice of appeal by plaintiff. Bond fixed at $200. 91-480.

1895, April 10.—Appeal bond filed.

January Term, March 23, 1895.

This cause came on to be heard on the motion filed by the defendant to the petition, and was argued by counsel and submitted to the court; on consideration whereof, the court adjudges said motion not well taken and overrules the same, and this cause further came on to be heard upon the demurrer of defendant to the petition herein filed, and was argued by counsel and submitted to the court, on consideration whereof, and the court being fully advised in the premises, it is adjudged by the court that said demurrer be
10 and the same hereby is sustained, to which the plaintiff excepts, and thereupon, the plaintiff not asking to amend his petition, it is further adjudged by the court, upon the pleadings, that said petition be dismissed, and that said defendant, The Columbus, Hocking Valley and Athens Railroad Company, go hence without a day, and recover of the said plaintiff its costs in this behalf expended and incurred, taxed at $—. To all of which the plaintiff excepts and gave notice of his intention to appeal this case to the circuit court, and the court do fix the amount of the bond to be given by plaintiff to perfect said appeal at $200.

(Duly certified.)

11 Court of Common Pleas, Franklin County, Ohio.

MICHAEL S. VOUGHT, Plaintiff,
vs.
THE COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY, Defendant.

Petition.

(Filed June 9, 1894.)

The said plaintiff, Michael S. Vought, says, that he is a resident of the county of Fairfield, and a citizen and tax-payer of the State of Ohio. That he is now, and for some time past has been, the owner in fee-simple of a certain tract of land situated in the county of Fairfield and State of Ohio, and being parts of sections Nos. 20, 21 and 28, in Greenfield township, No. 15 and range 19, and bounded and described as follows:

On the north by the lands of George Buzzard and by the Hocking canal, on the east by the Hocking canal, and on the south by other lands of the plaintiff, and by the lands of Zebulon Peters, Silas Peters, W. W. Donaldson, John Duddleson and William Stanberry's heirs; and on the west by the lands of Silas Peters' heirs, John Duddleson, W. W. Donaldson, William Stanberry's heirs, M. A. Stanberry and John Ruff, containing six hundred acres more or less, all of which is in actual occupancy of plaintiff. That said lands are, and have been for many years, under a high state of improvement and used for the purposes of cultivation, and have
12 a special value from their location, and that for the purposes of reclaiming and draining said land, he has laid thereon about seventeen miles of drain tile.

Plaintiff further says, that heretofore, to wit: on the 8th day of February, 1826 (Ohio Laws, vol. 24, page 71) the Lancaster Lateral Canal Company was incorporated by an act of the General Assembly of the State of Ohio, and authorized to construct and operate a canal extending from the village of Carroll to the city of Lancaster, connecting with the Ohio canal at said village of Carroll.

A copy of which said act of incorporation is hereto attached marked "Exhibit A," and made a part of this petition.

Plaintiff further says, that in and by said act, said Lancaster Lateral Canal Company was authorized to appropriate lands for the purposes set forth therein, and in and by the same the said State of Ohio reserved the right to purchase said canal at its cost price. That thereupon said canal company acquired the right to use the lands upon which it is now located, for the purpose of a canal, and did construct the same. That afterwards and on the 22d day of December, 1838, the said State of Ohio elected to purchase said canal, and did, in fact, purchase the same and received a conveyance thereof from said canal company to be held and used by the State of Ohio for the purposes of navigation. A copy of said deed is in the words and figures following, to wit:

Whereas, by an act of the General Assembly of the State of Ohio, of the ninth of March, 1838, entitled "An act to authorize the board of public works to purchase for the use of the State of Ohio, the Lancaster Lateral canal," it is, amongst other things, provided, that the board of public works are thereby authorized and re-
13 quired, in the name and for the use of the State of Ohio, to purchase of the directors of the Lancaster Canal Company, the said canal, and hold the same for the use of the State, paying therefor the actual cost of locating, constructing and repairing the said canal, with lawful interest as the same shall be established by the oaths of the proper officers of said company, deducting therefrom the amount granted by the State in aid of said canal, with lawful interest thereon from the time of payment thereof.

And whereas, the said board of public works and the president and directors of said Lateral Canal Company, in conformity with the provisions of purchase above recited, have fixed and adjusted the sum to which the said company is entitled, at sixty-one thousand two hundred and forty-one dollars and four cents, being the actual cost of locating, constructing and repairing said canal, after deducting the amount granted by the State in aid of said canal, with interest thereon as the same has been established by the oaths of the proper officers of said company.

Now know ye, that the said Lateral Canal Company, for and in consideration of the premises and for and in consideration of the said sum of sixty-one thousand two hundred and forty-one dollars and four cents, to the said company paid by the State of Ohio, and for the purpose of carrying into effect the above-recited act, doth by these presents grant, bargain, sell and convey to the State of Ohio and its assigns, in fee-simple, the said Lancaster Lateral canal, with all the fixtures and easements thereto appertaining, for the purposes of navigation, to have and to hold the same to the said State of Ohio and its assigns forever, in as full and ample a manner as the said company now hold and possess the same.

14 In testimony whereof, the said company has caused their common seal to be hereto affixed by John Creed, their president, on this twenty-second day of December, A. D. eighteen hundred and thirty-eight (1838).

JOHN CREED, *President.* [SEAL.]

Signed, sealed, and delivered in presence of—
W. T. MARTIN.
JAMES TAYLOR, JR.

THE STATE OF OHIO, }
Franklin County, } ss:

Before me, the subscriber, an acting justice of the peace within and for said county, personally appeared John Creed, president of the Lancaster Lateral Canal Company, and acknowledged the foregoing instrument of writing to be the proper act and deed of said company, for the purposes therein mentioned.

Given under my hand and seal this 22d of December, A. D. 1838.

W. T. MARTIN,
Justice of the Peace.

LANCASTER, *Dec.* 22*d*, 1838.

At a meeting of the directors of "the Lancaster Lateral Canal Company."

Present: John Creed, president; Samuel F. McCracken, Thomas Ewing, Philemon Beecher, —— Scofield, Benjamin O'Connell, and Jacob Green.

Ordered that John Creed, president for the company, do place the common seal of the conveyance of this date, made by the company to the State of Ohio, of the Lancaster Lateral canal, and that said president acknowledge and deliver the said deed in the name of the company.

F. A. FOSTER, *Secretary.*

15 RECORDER'S OFFICE, FAIRFIELD COUNTY, OHIO.

This instrument of writing received December 24th, 1838, and recorded 29th same month in Book No. 4, pages 357 and 358.

Attest: W. L. KING, *R.*, *F. C.*

Endorsement on deed.

RECORDER'S OFFICE, FAIRFIELD COUNTY, OHIO.

This deed received December 24th, 1838, and recorded 29th same month in Book No. 4, page 358.

Attest: W. L. KING, *R.*, *F. C.*

Plaintiff says that many years ago the State of Ohio, through certain aid granted to the State by the United States, and by virtue of a certain compact entered into by the United States and the State of Ohio, which is hereafter more fully set forth, made certain purchases and acquired the right to extend said canal to the town of Nelsonville, in Athens county, and did complete and extend the same, and the same is known and commonly called the Hocking canal, and the east line of plaintiff's said lands is in the center of said canal. The plaintiff further says that the said Hocking canal extends from the village of Carroll, in Fairfield county, and the Ohio canal, through the counties of Fairfield, Hocking and Athens, to the village of Nelsonville, in the said last-named county; and the same has since its construction been a part of the canal system of the State of Ohio, and an extension of the Ohio canal, and the State of Ohio is the owner of and in possession of said canal, which is now in use for navigation and other purposes hereinafter set forth.

16 The plaintiff further says that the said defendant, The Columbus, Hocking Valley and Athens Railroad Company, on the 12th day of April, 1894, filed with the secretary of state its articles of incorporation in said name, which articles of incorporation were then and there duly recorded, and that the principal office of said company, fixed by said articles of incorporation, is at the city

of Columbus, in the county of Franklin, in said State. Said corporation was organized for the purpose of building and operating a railroad from the city of Columbus, in the county of Franklin, and extending through the counties of Franklin, Fairfield, Hocking and Athens, all in the State of Ohio, the said corporation being authorized to exercise such powers, rights, privileges and franchises only as are provided for and conferred by the general laws of the State of Ohio, regulating the organization and incorporation of railroad companies.

Plaintiff further says that said defendant, since the 18th day of May, 1894, has been and still is claiming the right, privilege and franchise of entering upon, taking possession of and controlling the Hocking canal, above described, and especially that portion extending through the lands of plaintiff, above described, including all the property, rights, interests and appurtenances connected with said Hocking canal, between the points above named. The said defendant claims the right, privilege and franchise of taking possession, controlling said property and constructing and operating a railroad along and over the said canal, by virtue of an act of the General Assembly of the State of Ohio, passed on the 18th day of May, A. D. 1894. Said act is in words and figures following, to wit:

17 S. B. An act No. 315.

To provide for the abandonment of the Hocking canal for canal purposes and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking canal, from its junction with the Ohio canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise, and privilege of constructing, maintaining and operating over, upon and along the Hocking canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said installment of fifty thousand dollars shall be paid into the State treasury before the construction of said railroad is begun, and for the remaining installments of rental the State
18 of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges, and other structures

erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of state, the secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property-holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property-holders by reason of the construction and operation of said railroad. Provided that when said railroad, its successors and assigns cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

19 SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

LEONIDAS H. SOUTHARD,
Speaker pro Tem. of the House of Representatives.
ANDREW L. HARRIS,
President of the Senate.

Passed May 18th, 1894.

The said Hocking Canal property, above described, was acquired by the State of Ohio by virtue of the acts relating to the Lancaster Lateral Canal Company, above set forth, and also by virtue of certain acts of the Congress of the United States, and by the General Assembly of the State of Ohio, under and by virtue of certain agreements entered into by and between the United States and the State of Ohio, as hereinafter set forth. That between the 23d day of February, 1820, and the 8th day of February, 1825, the General Assembly of the State of Ohio presented to the Senate and House of Representatives of the United States, memorials and resolutions in which were set forth the advantages which the United States would derive from the construction of certain canals, and particularly the

Ohio canal, extending from the Ohio river at the mouth of the Scioto river, to Lake Erie, and requesting the Congress of the United States to grant to the State of Ohio aid in the construction of said canal and extensions thereof, which might thereafter be made.

And thereupon, in response to said resolutions and memorials, on the 24th day of May, 1828, the Congress of the United States
20 passed an act entitled "An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said State to aid in the construction of said canals authorized by law;" the fifth section of which act is in the words and figures following, to wit:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the State of Ohio, five hundred thousand acres of the land owned by the United States, within the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, created by said State in the construction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extension of canals now making; which lands, when selected, shall be disposed of by the legislature of Ohio, for that purpose and no other: Provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same; and provided further, that the said canals, already commenced shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales, shall not be affected by that failure."

It was further provided by the seventh section of the said act that "said act shall take effect provided the legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions thereof; and unless such expression of assent be made, this act shall be wholly inoperative."

21 And thereupon, in pursuance of said act of Congress, on the 22d day of December, A. D. 1828, the General Assembly of the State of Ohio assented to the several provisions and conditions of said act; which said act is in the words and figures following, to wit:

"An act declaring the assent of the State of Ohio to the provisions and conditions of an act of Congress." (See page 319.)

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the assent of the State of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty-eight, and entitled 'An act to aid the State of Ohio in extending the Miami canal from Dayton to Lake Erie, and to grant a quantity of land to said

State, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas Territory.'

" EDWARD KING,
" *Speaker of the House of Representatives.*
" SAMUEL WHEELER,
" *Speaker of the Senate.*

" December 22d, 1828."

That in pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the State of Ohio, the State of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said act hereinbefore set forth, and has from time to time sold and disposed of the same, and has received from the proceeds of such sale upwards of the sum of $2,200,000. That at the time of the passage of
22 the several acts above mentioned, the Ohio canal, extending from the mouth of the Scioto river through the State of Ohio to Lake Erie, was then located and in process of construction, with its various branches and extensions, which said canal passed through the village of Carroll, in said county of Fairfield. And that afterwards, on the date hereinbefore mentioned, the said Lancaster Lateral canal was purchased by the State of Ohio for the sum of $61,241, the said sum being paid to the said Lancaster Lateral Canal Company by the board of public works, in pursuance of said act, out of the canal funds belonging to the State of Ohio, derived from and created by the sale of the lands granted by the United States, as hereinbefore set forth.

Afterwards, to wit, on March 7th, 1836, the General Assembly of Ohio, by an act passed on that date, authorized the canal commissioners of the board of public works of the said State, to extend the said Lateral canal from its terminus in the town of Lancaster, to the town of Athens, in Athens county; and the said commissioners were, by the said act, authorized to borrow on the credit of the State of Ohio $350,000, for the purpose of constructing said canal; and afterwards the said commissioners were authorized, by an act of the General Assembly, to borrow the additional sum of $300,000, for the purpose of completing the said canal between the points aforesaid.

The plaintiff further says, that the said canal so authorized to be constructed, was completed and opened as a continuous line of canal for navigation purposes, on and prior to the first day of January, 1842. The entire purchase price of said Lateral canal, above described, and the continuation thereof from Lancaster to Athens, as well as the loan above referred to, made for the purpose of
23 constructing said canal, was paid out of the canal fund of the State of Ohio, which said fund was, in part at least, created by the proceeds of the sale of said lands granted to the State of Ohio as hereinbefore stated. And thereupon the said canal was constructed by the State of Ohio and became and was, and ever since has been, an extension and continuation of the Ohio canal

from the village of Carroll to its termination in the said county of Athens.

The plaintiff further says, that ever since the construction of said canal, which is and has been known as the Hocking canal, the same has been, and still is, a public highway, which has been used for the use of the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress and of the General Assembly of the State of Ohio, hereinbefore set forth.

Plaintiff further says, that said canal cuts off from plaintiff's said land all the drainage from lands lying east therefrom, and the waters falling upon said lands east of plaintiff, as aforesaid, all run and flow into said canal, and plaintiff has provided for the drainage of all the water falling upon his said lands by means of tile drains, as before mentioned.

Plaintiff further says that the abandonment of the canal and the construction of said railroad will place increased burdens upon his said lands; will subject his said lands to the flow of waters from the east, which since the year 1836 have been intercepted by said canal, and subject them to overflow and render them unfit for the purposes of cultivation and greatly less valuable.

The plaintiff further says that the said act under which the said defendant claims the right to enter upon and take possession of the said canal, and to construct and operate a railroad thereon,
24 passed May 18, 1894, confers no authority, power, or right upon said defendant to enter upon said lands and to use the same for the purposes of building and operating a railroad, or for any other purpose.

Plaintiff says that the said act is null and void, for the following reasons:

1. Because the said act conflicts with section 10, article 1, of the Constitution of the United States, which provides that "no State shall pass any bill impairing the obligation of contracts."

2. Because said act conflicts with section 28, article 2, of the constitution of the State of Ohio, which provides that "the General Assembly shall have no power to pass laws impairing the obligation of contracts."

3. Because said act conflicts with article 13, section 1, of the constitution of the State of Ohio, which prohibits the legislature from passing any special act conferring corporate powers.

4. Because said act conflicts with section 16, article 2, of the constitution of the State of Ohio, which provides, that "no bill shall contain more than one subject which shall be clearly expressed in the title."

5. The plaintiff further says that the said Hocking canal was at the time of said grant, and now is, worth at least from $600,000 to $700,000 for the purposes of the right of way for the construction of a railroad. That at the time of the passage of said act, the legislature of Ohio had before it a proposition from another railroad company duly incorporated under the laws of this State, having a larger capital and greater responsibility than the defendant, and which proposed to use said canal for the construction of a railway

exactly as proposed by the defendant and proposed to construct
25 the railroad in a much shorter space of time; the sum so offered by said other company being $5,000 a year larger than that for which said right of way was granted to the defendant, and at the same time it was proposed to the legislature that if such property was offered to competitive bidding the said other corporation would bid for the same an annual rental upon the basis of a valuation of $500,000.

6. The plaintiff further says, that while the grant to the defendant of said canal, as hereinbefore stated, was in form a lease thereof, yet in substance and in fact it was a donation of the greater part of said property to the said defendant for its own private purposes; that said act is null and void because it is against public policy, and against the rights and interests of the people of Ohio, and it is not within the grant of legislative power given to the General Assembly by the provisions of article 2 of the constitution of Ohio.

7. The plaintiff further says, that the Lancaster Lateral Canal Company, which constructed the part of said Ohio canal between Carroll and Lancaster, acquired only the easement for the purposes of navigation along and over the lands through which said canal was located and constructed, and that by the conveyance of that part of the said property by said company to the State of Ohio, the State of Ohio only acquired the same right and interest in and to that portion of the said canal which the said Lancaster Lateral Canal Company had at the time of its said conveyance.

8. The plaintiff further says, that as the said grant made by the said act of the General Assembly of May 18th, 1894, purports to convey a greater title than the State had in the said canal property, and also attempts to confer upon said defendant the right to use the said property for purposes other and different from that for which the State had the right to use the same, the said grant is ex-
26 cessive and greater than the General Assembly of Ohio had the power to convey, and therefore void.

The plaintiff further says, that the said defendant is about to comply with the terms and provisions of the said act of the General Assembly of date of May 18th, 1894, and has already given bond to the State of Ohio, as provided for in said act, and the said defendant has made payment of the money provided to be paid by the said defendant in said act, and the said defendant is also unlawfully making preparations to build, maintain and operate said railroad upon said line and upon said canal, and for this purpose it is unlawfully and without authority threatening to take possession of said canal and all said property and fixtures connected therewith for the sole purpose of building, maintaining and operating a railroad thereon for all time to come, which, if consummated, will constitute a permanent injury and destruction of plaintiff's property and rights; that the said defendant, by the destruction of said canal, will irreparably injure the lands of plaintiff, hereinbefore set forth, and will destroy the value of the drainage system which said plaintiff has constructed upon his land, and will also place very large additional burdens upon said plaintiff's lands, and great and irrep-

arable injury will be done the plaintiff in the premises, unless the defendant is restrained from taking possession of said canal and constructing the railroad thereon.

The said plaintiff, therefore, prays the court here that the said defendant may be enjoined from entering upon said canal property and taking possession of the same, and from doing any of the acts which are now threatened by the said defendant in the premises, and especially that the said act of the General Assembly of Ohio of date May 13th, 1894, under which the said defendant claims
27 to be acting, may be declared by the court to be null and void, and that upon a final hearing the plaintiff may have a perpetual injunction restraining the defendant from doing any and all the acts herein complained of, and for all other and proper relief in the premises.

C. W. McCLEERY,
BRAZEE & BRAZEE,
J. B. FORAKER,
HARRISON, OLDS & HENDERSON,
POWELL, RICKETTS & BLACK, AND
DANIEL J. RYAN, *Attorneys for Plaintiff.*

(Verification and certificate attached.)

Precipe.

To the sheriff:

Issue summons in the above case returnable according to law. Indorse "Equitable relief."

C. W. McCLEERY,
BRAZEE & BRAZEE,
HARRISON, OLDS & HENDERSON,
J. B. FORAKER,
POWELL, RICKETTS & BLACK, AND
DANIEL J. RYAN, *Attorneys for Plaintiff.*

28 "EXHIBIT A."

(Copy.)

An act to incorporate the Lancaster Lateral Canal Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That Philemon Beecher, William W. Irvin, Thomas Ewing, John Creed, Elnathan Scofield, William Trimble, Jacob Claypool, Samuel F. McCrackin, Christian King, Jacob Green, Samuel Effinger, Richard Hooker, John A. Collins, Gotlieb Steinman, John Noble, Jacob Graybill, Isaac Mason, and also all other persons who shall become associated with them by subscribing to the capital stock of said company, be, and they are hereby, constituted and declared a body corporate and politic, with perpetual succession, by the name and style of the Lancaster Lateral Canal Company, for the purpose of making a navigable canal from the town of Lancaster to such

point of the Ohio canal as shall be found most eligible; and for this purpose the said company is hereby authorized and empowered to have and receive, purchase, possess, enjoy and retain lands, rents, goods, chattels and effects of any kind, and to any amount necessary to carry into effect the object of the institution; and the same to use, sell, alien and dispose of at pleasure; to sue and be sued, defend and be defended, in all courts having competent jurisdiction; to have and use a common seal, and the same to break, alter and renew at pleasure; to ordain and establish such rules, regulations and by-laws as may be necessary for the well ordering and governing the corporation; and generally to possess all the privileges and to do and perform all the acts necessary to a corporation, subject, however, to the restrictions, provisions and limitations contained in this act.

SEC. 2. That the capital of the said company shall consist of fifty thousand dollars, which stock shall be divided into shares of fifty dollars each, and shall be transferable in entire shares, in such manner as the rules of the corporation prescribe; provided, that no stockholder, without the consent of the directors, shall be at liberty to transfer his stock, after any installment is ordered, until such stockholder shall have paid the amount due on his stock.

SEC. 3. That the persons named in the first section of this act, or in case they should not all choose to serve, then any number of them not less than nine shall be commissioners to receive subscriptions, and also to do and perform all necessary acts to organize the company; and they are hereby authorized and empowered to cause books to be opened at such time and in such places as a majority of them shall think proper, to receive subscriptions to constitute the capital stock of said company; the commissioners may, if they think proper, require ten per centum of the amount of each subscription to be paid at the time it is subscribed; and each subscriber shall be bound to pay, from time to time, such installments on his stock as the directors may lawfully require.

SEC. 4. That when five hundred shares are subscribed the commissioners shall call a meeting of the subscribers, by causing notice of the time and place of such meeting to be published in some newspaper in general circulation in the places in which the books shall have been opened and the stock subscribed; and on such notice being given, the stockholders shall meet at the time and place appointed, and when so assembled, may proceed to elect directors and adopt such rules and regulations for the government of the corporation as are lawful and expedient; the stockholders may vote by person or by proxy, and for each share such stockholder may possess he shall be entitled to one vote.

SEC. 5. That the affairs of the company shall be managed by nine directors, or a majority of them, who shall be elected by the stockholders once in three years, unless a shorter period shall be ordained by the rules of the corporation; and each director shall be a stockholder at the time of his election, and shall cease to be a director if he cease to be a stockholder.

SEC. 6. That the directors so elected or appointed, shall, at their

first meeting after said election, choose one person from their own number, who shall serve as a president of the board, for and during the time for which he has been elected a director; the president and directors, previous to entering on the duties of their office, shall severally take an oath or affirmation, faithfully and impartially to discharge all duties appertaining to s-id office, by virtue of the provisions of this act or the rules of the corporation; they shall appoint a treasurer, and cause him to give bond, with security conditioned for the faithful performance of all duties appertaining to said office; they shall determine the amount of any installments, and the time when it shall be paid, but no stockholder shall be required to pay any installment until after such order has been published in some newspaper which circulates in the place where such stockholder resides, or where his stock was subscribed at least thirty days before the time of payment; neither shall any stockholder be bound to pay more than ten per centum on the amount of his stock at one time, nor more than thirty per cent. in any one year.

SEC. 7. That it shall be the treasurer's duty to keep the
31 books of the corporation; to receive and collect from subscribers and others, all moneys due the corporation, and on proper vouchers being produced, to pay out the same; he shall as often as required, exhibit to the directors an account of all sums of money by him so received and paid out, and the books, accounts and vouchers thus kept shall at all times be subject to the inspection of the stockholders; provided the said company shall never make use of their funds for banking purposes.

SEC. 8. That it shall and may be lawful for said directors to enter upon and take possession of any lands, waters and streams necessary to make said canal, or any of its appendages, such as feeders, dykes, locks, dams and other works, doing, nevertheless, no unnecessary damage; and in case any lands, waters or streams so wanted to be appropriated for any of the purposes aforesaid, shall not be given or granted to said corporation, and the proprietor or proprietors cannot, or do not agree with the directors as to the amount of damages or compensation which ought to be allowed or paid for the same, and shall not mutually agree on some person or persons to appraise the damages, it shall be lawful for the directors aforesaid, to apply to any judge of the court of common pleas of the county, not a stockholder in said company, who shall appoint three disinterested freeholders to assess the damages; the directors shall give notice to such persons of their appointment, and also to the adverse party, or his guardian, agent or attorney; and it shall be the duty of the persons appointed, to attend at the time and place specified in the notice, who, after being duly sworn or affirmed faithfully and impartially to discharge their appointed duties, shall proceed, on actual view, to make a just estimate and appraisement of any damage such individual owner or owners may sustain, tak-
32 ing into consideration the benefits which such proprietor or proprietors will derive from the location and making of said canal; and shall make a certificate of such appraisement, with a

particular description of the premises, to which certificate they, or a majority of them, shall sign their names, and deliver to each party one copy; and immediately thereafter, if no damages are assessed, or on the payment or tender of money, to the amount of damages assessed to the person or persons injured, his guardian, agent or attorney, the said directors may proceed to enter upon and occupy such lands, streams or waters, *and a complete title to the premises, to the extent and for the purposes set forth in, or contemplated by this act shall thereby be vested and forever remain in said company and their successors;* provided, however, that if either party shall consider himself aggrieved by the decision of the appraisers, so as aforesaid made, such party may apply to the court of common pleas, of the proper county, at the succeeding term of said court, or if there should not be a quorum of said court disinterested, then to the supreme court, at their next session in said county, giving ten days' notice of such intention to the adverse party; and the said court, upon good cause shown, shall appoint three disinterested freeholders who shall, after being duly qualified, proceed to view and appraise the damages, and shall certify their proceedings in the same manner as the former appraisers, and their decision shall be final and determinate, but the pendency of any such application to the court, shall not, in the meantime, hinder the progress of the work; provided, however, that this act shall not be so construed as to authorize the taking or diverting from their course, any streams or waters probably necessary to feed or supply the Ohio canal, without permission first obtained from the board of canal commissioners.

33 SEC. 9. That it shall be the duty of the company, hereby incorporated, to cut, make and construct said canal of such width and depth, with locks of such length and dimensions, as will be most economical and convenient for canal navigation, and it shall also be the duty of said company to construct a bridge over said canal, suitable for the passage of carriages, at each and every place where any State or county road crosses the same, and when the lands of any individual are so cut and divided as to leave any valuable portion on each side of the canal, the company, if required by the owner of such lands, shall build a suitable bridge to connect the same, *and when the said canal is so made and completed it shall forever thereafter be esteemed and taken to be navigable as a public highway*, free for the passage of boats, and for the transportation of all goods, commodities and products whatsoever, on payment of the tolls which may lawfully be required.

SEC. 10. That for and in consideration of the expense which the said company will necessarily incur in constructing said canal, with the appurtenances thereof, and in improving and keeping the same in repair, the said canal, with all the appurtenances thereof, together with all tolls and profits arising therefrom, are hereby vested in the said corporation; and the same shall be forever exempt and free from the payment of any tax, imposition or assessment, whatsoever; provided, that the State shall have power at any time after the completion of said canal, *to purchase and hold the same for the use of the State*, by paying to the said company therefor, such

sum as will be equal to the expense incurred by said company in surveying, locating, constructing and keeping the same in repair, together with ten per cent. thereon.

SEC. 11. That when the whole or any part of the canal is completed, according to the true intent and meaning of this act,
34 the president and directors shall have power, and it is hereby made their duty, to ordain and establish a rate of tolls, which shall be paid upon vessels, boats, rafts, or other property passing on such part or whole line of the canal that is navigable; and for the collection of said tolls, the president and directors shall appoint collectors and establish toll-houses at all proper places; and may ask, demand and receive, on all boats, rafts, vessels and other property passing or navigating on said canal, such tolls as shall be established agreeably to the provisions of this act; and also may rent, sell and dispose of any superabundant or waste waters of the canal; provided, that any subsequent legislature may regulate the rate of tolls which said company may receive at any time after the expiration of twenty years from the completion of said canal.

SEC. 12. That the president and directors shall, annually or semi-annually declare and make a dividend of the net profits arising from tolls, or from any other source, reserving such sum or sums as will defray the necessary current and probable contingent expenses, which dividend shall be paid or passed to the credit of the stockholders, severally, in proportion to the shares which each may hold in the stock of said company.

SEC. 13. That the company shall be entitled to the benefit of all laws which are, or shall be in force, for the collection of tolls, or for the protection of any canals constructed by this State, so far as such law or laws shall be necessary to insure the collection of tolls, or for the protection of the canal or other property which the company may lawfully hold, in order to carry into effect the provisions of this act.

WM. W. IRVIN,
Speaker of the House of Representatives.
ALLEN TRIMBLE,
Speaker of the Senate.

February 8, 1826.

(Ohio Laws, vol. 24, pages 71 to 77, inclusive.)

35 *Motion.*

(Filed Oct. 13, 1894.)

And now comes the defendant and moves the court here to strike out of the petition of plaintiff herein, as redundant and irrelevant, the following parts of the same, to wit: Beginning at the first word, "the," in the fifteenth line from the bottom of page 7, and ending with the word "failure," in the sixth line from the top of page 8.

Also, beginning with the word "which," in line fifteen from the

bottom of page 8, and ending with the figures "1828," in the last line of page 8.

LEVI J. BURGESS AND
D. L. SLEEPER,
Attorneys for Defendant.

Demurrer.

(Filed March 23, 1895.)

And now comes the defendant and demurs to the petition of the plaintiff, for the reason that the same does not state facts sufficient to constitute a cause of action against this said defendant.

L. J. BURGESS,
SELWYN N. OWEN,
GROSVENOR & JONES,
D. L. SLEEPER,
Attorneys for Defendant.

36 *Entry.*

(Filed March 23, 1895.)

This cause came on to be heard on the motion filed by defendant to the petition, and was argued by counsel and submitted to the court, on consideration whereof the court adjudges said motion not well taken and overrules the same, and this cause further came on to be heard upon the demurrer of defendant to the petition herein filed, and was argued by counsel and submitted to the court, on consideration whereof, and the court being fully advised in the premises, it is adjudged by the court that said demurrer be, and the same hereby is, sustained, to which the plaintiff excepts. And thereupon the plaintiff not asking to amend his petition, it is further adjudged by the court, upon the pleadings, that said petition be dismissed and that said defendant, The Columbus, Hocking Valley & Athens Railroad Company go hence without a day, and recover of the said plaintiff its costs in this behalf expended and incurred taxed at $—.

To all of which the plaintiff excepts and gave notice of his intention to appeal this case to the circuit court, and the court do fix the amount of the bond to be given by plaintiff to perfect said appeal, at $200.

37 *Certified Transcript of Docket and Journal Entries.*

THE STATE OF OHIO, }
City of Columbus, } ss:

In the Supreme Court of Ohio, January Term, A. D. 1898.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

MICHAEL S. VOUGHT, Plaintiff in Error, vs. THE COLUMBUS, HOCKING VALLEY AND Athens Railroad Company, Defendant in Error.	# 5624. Error to the Circuit Court of Franklin County.

June 25, 1897.—Petition in error & waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers filed.
" 26, " Papers taken by D. J. Ryan.
Aug. 4, " " returned by D. J. Ryan.
" " " Printed record filed.
" 16, " Proof of service of printed record filed.
Sept. 30, " Motion by defendant to advance and notice filed.
Oct. 5, " Journal entry:

"Motion by defendant to advance cause No. 5624 on the general docket. Oral argument requested."

"Ordered by the court that said motion be, and the same is hereby, allowed, cause advanced, and briefs to be filed within rule. Oral argument noted."

Order Book No. 15, page 379.

Dec. 20, 1897.—Plaintiff's printed brief filed.
Mar. 22, 1898.—Journal entry:

"This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county, and was argued by counsel; on consideration whereof it is ordered and ad-
38 judged by this court that the judgment of the said circuit court be, and it hereby is, reversed at the costs of the defendant in error, to be taxed; and, rendering the judgment the court below should have rendered, it is ordered and adjudged that the said Columbus, Hocking Valley and Athens Railroad Company be, and is hereby, enjoined from entering upon the lands of the plaintiff in error described in his petition until it has condemned and paid for the additional burthen of constructing and operating a railroad on the land according to law. It is further ordered and adjudged that the plaintiff in error recover in this court and in the circuit court his costs in this behalf expended, to be taxed.

Ordered that a special mandate be sent the court of common pleas of Franklin county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the circuit court of Franklin county 'for entry.'"

Order Book No. 16, page 35.

Mar. 29, 1898.—Mandate issued.
April 29, 1898.—Journal entry:

"On motion of the said plaintiff in error, this court doth order that it be certified and made a part of the record in this case and of the judgment rendered herein by this court at the present term thereof, to wit, on the 22nd day of March, A. D. 1898, and of the

entry thereof, that in the rendition of said judgment it became and was material to the case to determine whether an act of the General Assembly of the State of Ohio entitled 'An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company,' passed May 18th, 1894, and found in volume 91, page 327, of the Laws of Ohio, is a law of said State and was and is of binding force and validity against the said plaintiff in error. The court order that it be further certified that said plaintiff in error, on the hearing of said cause, claimed and asked this court to hold that the said act is in violation of and repugnant to section 10 of article I of the Constitution of the United States, which ordains that 'No State shall pass any bill impairing the obligation of contracts;' and this court orders it to be further certified that this court decided and adjudged that said act passed by the General Assembly of Ohio as aforesaid was not in violation of nor repugnant to said section 10 of article I of the Constitution of the United
39 States, and decided and adjudged that said act was and is valid and binding upon said plaintiff in error, and thereupon rendered said judgment, which is founded upon said decision of this court that said act was and is of binding force and validity against the said plaintiff in error; and this court further ordered a special mandate to carry said judgment into execution, as is shown by the entry heretofore made of said judgment and order; and it is further ordered by this court to be certified that the question of the validity of said act of the General Assembly, in the particular mentioned hereinabove was drawn in question on the hearing and decision of this case as being repugnant to said section 10 of article 1 of the Constitution of the United States, and that the decision of the court was in favor of the validity of said act as against the said plaintiff in error; and it is hereby certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had."

Order Book No. 16, page 76.

40 Supreme Court of Ohio.

THE STATE OF OHIO, }
City of Columbus, } *ss:*

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing are all the entries in cause No. 5624, Michael S. Vought *vs.* The Columbus, Hocking Valley and Athens Railroad Company, and are truly taken and correctly copied from the minute and order books of said court, and that the printed record hereto attached is a true copy of the printed record filed in this cause in this court and used in the consideration of said cause by said court.

In witness whereof I have hereunto subscribed my name and

affixed the seal of said supreme court this twelfth day of May, A. D. 1898.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk.*

41 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of the plea which is in the said supreme court of the State of Ohio, before you, being the highest court of law or equity in the said State in which a decision should be had in the said suit between Michael S. Vought and the Columbus, Hocking Valley & Athens Railroad Company, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the laws of the United States and to the Constitution of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of the said Michael S. Vought, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, within thirty days from the date thereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct
42 that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. Circuit Court, S D. O.,
By ROB'T C. GEORGI, *Deputy.*

Allowed and approved by me—

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of Ohio.

43 [Endorsed:] Michael S. Vought *vs.* C., H. V. & A. R. R. Co. Writ of error.

44 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Columbus, Hocking Valley & Athens Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio wherein Michael S. Vought is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ or error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. T. Spear, chief justice of the supreme court of the State of Ohio, this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

Service by copy of the above citation is hereby acknowledged the 19th day of May, A. D. 1898.

SELWYN N. OWEN,
Of Counsel and Attorney for the Defendant in Error.

45 [Endorsed:] Michael S. Vought *vs.* C., H. V. & A. R. R. Co. Citation.

46 *Assignment of Errors.*

Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Eight Hundred and Ninety-eight.

MICHAEL S. VOUGHT, Plaintiff in Error,
vs.
THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Michael S. Vought, by Joseph B. Foraker, Richard A. Harrison, Daniel J. Ryan, and Thomas E. Powell, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

The supreme court of the State of Ohio erred in holding and deciding that the act of the General Assembly of the State of Ohio passed May 18, 1894, entitled "An act to provide for the abandonment of the Hocking canal for canal purposes, and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company," is not in violation of nor repugnant to the Constitution of

the United States, and that the said act does not impair the obligation of contracts in either of the particulars as claimed by the said plaintiff in error.

47 Said supreme court of the State of Ohio erred in deciding and holding that the said act of the General Assembly of the State of Ohio passed May 18, 1894, was and is valid and binding upon said plaintiff in error.

And the said Michael S. Vought prays that the judgment aforesaid of the supreme court of the State of Ohio may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by reason of the said judgment.

R. A. HARRISON,
J. B. FORAKER,
T. E. POWELL, AND
D. J. RYAN,
Attorneys for Plaintiff in Error.

48 [Endorsed:] Michael S. Vought *vs.* C., H. V. & A. R. R. Co. Assignment of errors.

[Endorsed:] Supreme court of Ohio. Michael S. Vought *vs.* The Columbus, Hocking Valley and Athens Railroad Co. No. 5624. Certified transcript.

Endorsed on cover: Case No. 16,903. Ohio supreme court. Term No., 318. Michael S. Vought, plaintiff in error, *vs.* The Columbus, Hocking Valley & Athens Railroad Company. Filed June 9, 1898.

FILED
DEC 1 1898
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

Filed Dec 1, 1898.
JOHN J. WALSH.

No. 16901. vs.
THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

No. 16902. ROBERT WRIGHT, vs. THE SAME.

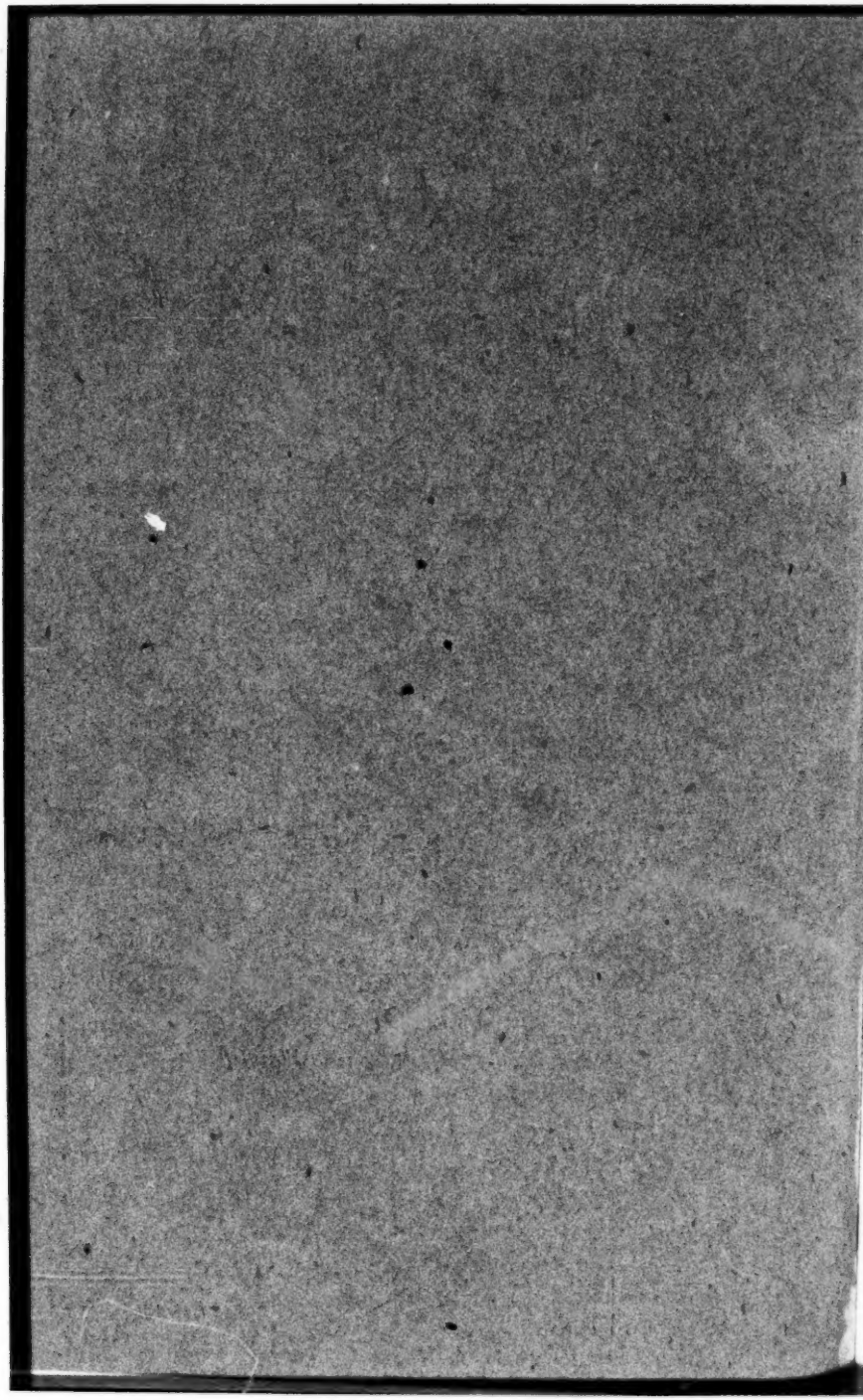
No. 16903. MICHAEL St. VOUGHT, vs. THE SAME.

ON MOTION TO DISMISS PETITION IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR AGAINST SAID MOTION.

J. B. FORAKER,
T. E. POWELL,
D. J. RYAN,
Counsel for Plaintiffs in Error.

COLUMBUS:
PRESS OF SPARE AND GLENN,
1898.



Supreme Court of the United States.

JOHN J. WALSH,

No. 16901. vs.

THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

ROBERT WRIGHT,

No. 16902. vs.

THE SAME.

MICHAEL S. VOUGHT,

No. 16903. vs.

THE SAME.

ON MOTION TO DISMISS PETITION IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR AGAINST SAID MOTION.

STATEMENT.

The defendant in error by its counsel moves the Court to dismiss the petitions in error in the above cases for want of jurisdiction.

The motion also sets forth six different grounds for dismissal, which grounds involve the consideration of the cases on their merits.

In addition, defendants in error move the Court to affirm the judgment of the State Court, for the reason it is claimed, that the writ of error herein was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

I.

AS TO JURISDICTION.

These cases involve a federal question growing out of the relations of the State of Ohio and the United States, resulting from the construction of the State canals.

The judicial power of the United States extends to all cases, among others, in law and equity arising under the constitution, the laws of the United States and the treaties made under their authority.

Constitution, Art. 3, Sec. 2.

To give the necessary effect to this provision it has been provided that a "a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined, and reversed or affirmed in the Supreme Court (of the United States) on a writ of error."

Act of Sept. 24, 1789, as amended. Rev. Stat. U. S., Sec. 709.

This section includes all cases involving rights protected by the Federal Constitution, laws and treaties however created, and when a Federal question is clearly raised, there is jurisdiction, however frivolous the objection.

New Orleans v. *DeArmas*, 9 Pet., 224.
Hall v. *Jordan*, 15 Wall., 393.

In these cases there is drawn in question the validity of a statute of the State of Ohio, which was an act of its General Assembly, passed May 18, 1894, providing for the abandonment of certain canals in the State of Ohio, and the leasing of the same for railroad purposes. Reference is made to the record for the particulars thereof.

We contended in the State Court, that the statute referred to conflicts with Article I, Section 10, of the Constitution of the United States, which provides that "no State shall pass any bill impairing the obligation of contracts." By reference to the record it will be seen that it was also contended by plaintiffs in error that the canal referred to was constructed out of the proceeds of certain public lands granted to the State of Ohio by act of Congress, approved May 24, 1828, and that one of the conditions of the grant of said lands, as expressed in said act of Congress, was that said canals when completed or used should be and forever remain public highways for the use of the Government of the United States. This condition was accepted on part of the State of Ohio by the act of the General Assembly of said State, passed December 27, 1828.

It was claimed by plaintiffs in error that the law of Ohio which abandoned the canal in question and leased it for railroad purposes, was in violation of the compact which existed by virtue of the act of Congress, approved May 24,

1828, and act of the General Assembly of Ohio, passed December 22, 1828.

"When a writ of error is asked on the ground that a State law impairs the obligation of a contract, this Court must determine whether a contract exists, and what is its construction and obligation."

State Bank of Ohio v. *Knoop*, 16 How., 369.

"A Federal question arises when the allegation is that by statute a State made a contract, and by another violated it, and the State Court holds the later statute valid."

Binghampton v. *Bridge*, 3 Wall., 51.
Jefferson Bank v. *Skelly*, 1 Black., 436.
Bridge Proprietors v. *Hoboken Co.*, 1 Wall., 116.
Delmas v. *Insurance Company*, 14 Wall., 661.
University v. *People*, 99 U. S., 309.

Where the question raised is a Federal question, this Court will not sustain a motion to dismiss.

Spencer v. *Merchant*, 125 U. S., 345.

II.

AS TO DISMISSAL FOR OTHER REASONS ALLEGED.

The motion of the defendant in error also moves the Court to dismiss these actions not only because this Court has no jurisdiction, but for six other reasons, each and all of which involve the merits of the cases at bar.

This Court cannot decide the whole legal merits of a case on a motion to dismiss or quash the writ. In the case of *Hecker et al.* v. *Fowler*, 1 Black, 95, Chief Justice TANEY delivering the opinion of the Court, said:

"We are asked to dismiss this writ because no error appears on the face of the record. It is not necessary, by the practice of this Court, for the party who brings a cause here, to specify upon the record the errors he complains of, and they are not even informally brought to our notice until the argument is heard. Want of jurisdiction and irregularity of the writ are the only grounds for dismissal. Where a judgment appears to have been rendered which the party is entitled to have revised in this Court, and it is also seen that it comes here for such revision, upon proper process, duly issued, all other questions must await the final hearing. To say that there is no error in this judgment, and affirm it for that reason, would be to decide the whole legal merits of the case, and this we cannot do on a motion to dismiss or quash the writ."

And in the case of *Sparrow* v. *Strong*, 3 Wall, 97, it was held that on a motion to dismiss, the Court will look to the regularity of the writ and the fact of jurisdiction.

III.

AS TO MOTION FOR AFFIRMANCE.

The defendant in error also moves the Court to affirm the judgment and decree of the State Court, notwithstanding that this Court may have jurisdiction, for the following reasons:

(*a.*)—"That this writ of error was taken for delay only."

(*b.*)—"That the question on which the jurisdiction depends is so frivolous as not to need further argument."

As to delay.—It is clearly apparent from reference to the record in these cases, as shown by the docket of the clerk of the Supreme Court, that there has been no delay by the plaintiffs in error in their prosecution in this Court.

As to what may be regarded as delay or diligence, reference is made to the following cases:

Bingham v. *Morris*, 7 Cranch., 99.
Davidson v. *Lanier*, 4 Wall., 458.
United States v. *Virgil*, 10 Wall., 423.
Mesa v. *United States*, 2 Black, 721.
German v. *United States*, 5 Wall., 825.
Brooks v. *Norris*, 11 Howard, 204.

As to frivolty.—Suits which involve so grave a question as the right of a sovereign State to abandon its canals without the consent of the national government, cannot be said to be frivolous. Claims made by citizens of the United States that they have property rights which are injured or destroyed by reason of the violation of a compact which they claim exists between the United States and the State of Ohio, certainly are not frivolous. Suits which were deemed worthy of consideration by the Supreme Court of the State of Ohio; and in which, according to the record, its Chief Justice has certified that a federal question is involved, cannot certainly be declared to be frivolous.

The briefs filed by the counsel for the defendant in error upon this motion, combatting propositions raised in the petitions of the plaintiffs in error, are evidence themselves, that the controversy herein is not frivolous.

J. B. Foraker,
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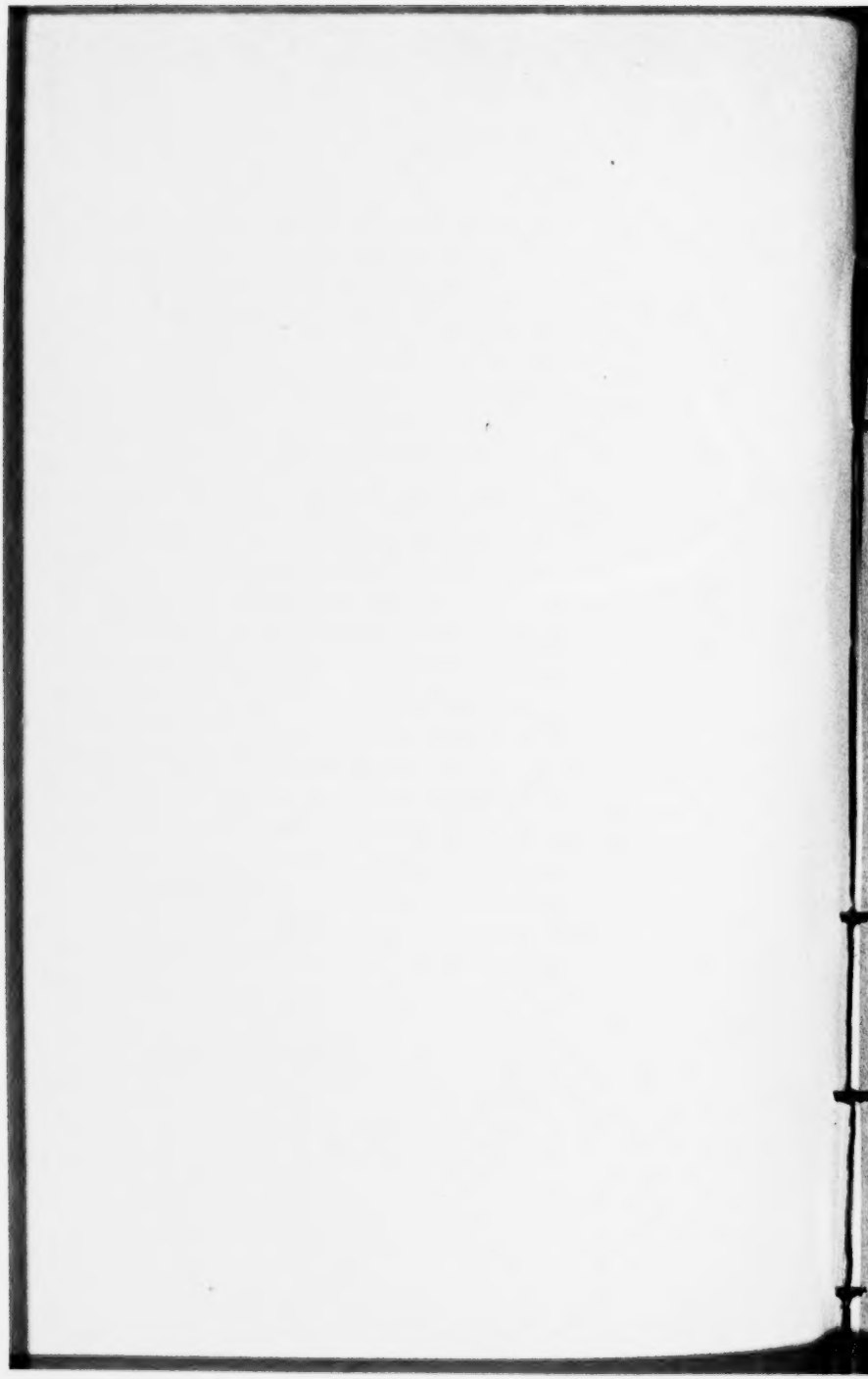
D. J. Ryan,
Counsel for Plaintiffs in Error.



Brief of Plaintiffs for U. S.
SUPREME COURT OF THE UNITED STATES
Filed October 13, 1899.

Nos. 316.

JOHN J. WALSH

vs.

THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

No. 317.

ROBERT WHITE vs. THE SAME.

No. 318.

MICHAEL VOUGHT vs. THE SAME.

In Error to the Supreme Court of the State of Ohio.

Brief for Plaintiffs in Error.

J. B. FORAKER,
Of Counsel for Plaintiff in Error.

THE COURT CRIER PRESS.

SUPREME COURT OF THE UNITED STATES

JOHN J. WALSH *vs.* THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.	No. 316.
ROBERT WRIGHT *vs.* THE SAME	No. 317.
MICHAEL S. VOUGHT *vs.* THE SAME.	No. 318.

In Error to the Supreme Court of the State of Ohio.

Brief for Plaintiffs in Error.

I.

There were a number of questions in these cases in the Courts below, but in this Court there is but one question and that is common to all these cases.

It is whether the act of the General Assembly of the state of Ohio, passed May 18th, 1894, violates the provision of Section 10, Article 1 of the Constitution of the United States, that "no state shall pass any bill impairing the obligation of contracts."

The following is a copy of the statute in question:

"S. B. AN ACT. No. 315.

"To provide for the abandonment of the Hocking Canal for canal purposes and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company:

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking Canal, from its junction with the Ohio Canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be, and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

"SEC. 2. There is hereby granted the right, franchise and privilege of constructing, maintaining and operating over, upon and along the Hocking Canal and property of the state of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley & Athens Railroad Company, its successors and assigns, for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the Treasurer of the state of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

"SEC. 3. Said installment of fifty thousand dollars shall be paid into the State Treasury before the construction of said railroad is begun, and for the remaining installments of rental the state of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges and other structures erected on said property of the state of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley & Athens Railroad Company shall further execute unto the state of Ohio, to be approved by the Auditor of State, the Secretary of State, and Attorney General, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars, conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the state of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the Secretary of State within ten days after the passage of this act.

"SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property

aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property holders along said canal, and shall hold the state harmless from all loss or damage resulting to such property holders by reason of the construction and operation of said railroad. Provided that when said railroad, its successors and assigns, cease to use said canal for railroad purposes, said canal property shall revert to the state for canal purposes.

"SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this state.

"SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

"SEC. 7. This act shall take effect and be in force from and after its passage.

"LEONIDAS H. SOUTHARD,
"*Speaker pro tem. of the House of Representatives.*
"ANDREW L. HARRIS,
"*President of the Senate.*

"Passed May 18th, 1894."

The question as to the validity of this act arises as follows: On the 24th day of May, 1828, the Congress of the United States passed an act entitled "An Act to aid the State of Ohio in extending the Miami Canal from Dayton to Lake Erie, and to grant a quantity of land to said state to aid in the construction of said canals authorized by law," the fifth section of which act is in the words and figures following, to-wit:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the state of Ohio five hundred thousand acres of land owned by the United States, within the said state of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, contracted by said state in the construction of the canals within the same, undertaken under the authority of the laws of the said state now in force, or that may hereafter be enacted, for the extensions of canals now making, which lands, when selected, shall be disposed of by the Legislature of Ohio, for that purpose and no other: provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same; and provided further, that the said canals, already commenced, shall be completed in seven years from the ap-

proval of this act, otherwise the state of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the state by such sales shall not be affected by that failure."

It was further provided by the seventh section of said act that "said act shall take effect, provided the Legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the state to the several provisions and conditions thereof; and unless such expression of assent be made, this act shall be wholly inoperative.

Afterward, on the 22d day of December, A. D., 1828, the General Assembly of the state of Ohio assented to the several provisions of said act by enacting the following:

"An Act declaring the assent of the state of Ohio to the provisions and conditions of an Act of Congress.

"SECTION 1. Be it enacted by the General Assembly of the state of Ohio, That the assent of the state of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty eight, and entitled 'An Act to aid the state of Ohio in extending the Miami Canal from Dayton to Lake Erie, and to grant a quantity of land to said state, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas territory.'

"EDWARD KING,
"*Speaker of the House of Representatives.*
"SAMUEL WHEELER,
"*Speaker of the Senate.*

"December 22d, 1828."

In pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the state of Ohio, the state of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said act of Congress, and it, from time to time, sold and disposed of the same, realizing therefrom proceeds to the amount of more than $2,200,000.00.

"The Hocking Canal" mentioned in the act of the General Assembly of Ohio, passed May 18th, 1894, was, as alleged in the petitions and admitted by the demurrers, a part of the Ohio canals

constructed by the state under the authority of the state duly enenacted for the extension of canals under construction at the time when the Congress of the United States passed the act of May 24th, 1828, and to the construction of which the funds arising from the sale of said grant of lands were applicable.

The record further shows that a part of the "Hocking Canal," to-wit: eight miles, extending from the village of Carroll to the city of Lancaster, was originally constructed by a company incorporated under the laws of Ohio, as the Lancaster Lateral Canal Company; but that the same was subsequently purchased from said company by the state of Ohio for the sum of $61,241.00, and that payment of this sum was made, in part at least, out of the funds arising from the sale of said public lands.

The remaining portion of the "Hocking Canal" here under consideration, to-wit: that portion extending from Lancaster to Nelsonville was constructed by the state of Ohio, and that the expenses of such construction were paid by the state, in part, at least, out of the funds arising from the sale of said public lands. In other words, the "Hocking Canal" affected by the act of the General Assembly of the state of Ohio, passed May 18th, 1894, was subject to all the terms and conditions applicable that were attached to the grant of said public lands by Section 5 of the act of the Congress of the United States, passed May 24th, 1828.

The petitioners are the owners of lands abutting upon this canal. These lands are prejudicially affected to the damage of their respective owners by the proposed abandonment of the canal. This is shown by the allegations of the several petitions, which are admitted by the demurrers, and the record discloses that the Supreme Court of Ohio has also made a finding to this effect and has, in the judgment it rendered, required the railroad company, defendant in error, to resort to condemnation before proceeding further. The plaintiffs claim that, by reason of this injury to their adjoining lands, they have a right to invoke the protection of the contract between the United States and the state of Ohio, with respect to the construction of this canal, found in the first proviso of the fifth section of the act of May 24th, 1828, as follows, to-wit: "Provided that said canals, when completed or used, shall be and forever re-

main, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any propperty of the United States, or persons in their service passing along the same."

Differently stated, the plaintiffs in error claimed below, and claim here, that this proviso reqnires the state of Ohio to continue canals to which it is applicable, including the "Hocking Canal" so long as this contract between the United States and the state of Ohio shall continue in force, and that the plaintiffs in error had a right to rely upon such continuance of this canal by the state until there should be a legal and valid abandonment by the state with the consent of the United States, and that the abandonment provided for by the act of the General Assembly of Ohio, passed May 18th, 1894, was without such consent.

In support of this proposition, plaintiffs in error contend, that

1. The effect of the act passed by the Congress of the United States May 24th. 1828, and the subsequent act of acceptance passed by the General Assembly of Ohio, December, 22d, 1828, was to make a contract.

2. The contract so entered into between the United States and the state of Ohio was a contract on the part of the state for and in behalf of all the citizens of the state, and therefore a contract to which these plaintiffs in error were in privity.

3. This contract, like any other, can not be discharged except only by performance, or, in case of abandonment, by agreement, to which agreement both original contractors must be parties.

4. This contract being for the benefit of these plaintiffs in error in common with all the citizens of Ohio, they had a right to rely upon the maintenance of the canal until this contract should in some way be validly terminated, and they have a right because of their special damage to call in question, and put to the test of validity, any unauthorized or illegal attempt at abandonment.

5. They have in consequence a lawful right, not as strangers, but as parties to the contract, to impeach the constitutionality of the statute of Ohio providing for this abandonment. Having this right, they are entitled to the judgment prayed for in their petitions, on the ground that while, generally, the state has a right to abandon a canal without regard to the injury that may thereby

be inflicted upon the owners of water rights and privileges, yet that rule applies only where the abandonment is legal, and not, as here, in violation of contract obligations.

II.

It was contended in the Courts below that Section 5 of the act of Congress of May 24th, 1828, did not apply to this particular canal—the "Hocking Canal." If that claim should be made here, it is a sufficient answer, that it appears from the petition that the canal in question was undertaken under the authority of the laws of Ohio in force at the time when the act of Congress was passed as an extention of the Ohio Canal, which was then being constructed. (Page 9, Record in Walsh case, 316).

III.

It was also contended in the Courts below, and that contention has been repeated here, that the proviso relied upon applies only so long as the said canal *may be used*, and that when the state ceased to *use* the canal in question the requirement relied upon ceased to operate.

This contention is based on the following language of said proviso, to-wit: "Provided, the said canals, when completed *or used*, shall be, and forever remain," etc.

The proper construction of this language is manifest, and such construction does not allow the contention under consideration. By the language "completed or used" it was intended to provide that the requirement in question should commence to operate the moment the canal was completed, or, not being wholly completed, should commence to be used.

In other words, the language "completed or used" had relation to the time when the requirement should commence to operate and not to the time when it should cease to operate, and the addition of the words "or used" after the word "completed" was intended to provide for an earlier operation of the requirement in the case of use before completion than was provided for by the word "completed."

IV.

Coming now to the question of abandonment, our contention is not that canals are constructed for the benefit of the lessees of water leases and privileges, and that the state must maintain them on account of such interests. On the contrary, we admit this canal was constructed for highway purposes, and we further admit that water privileges are only an incident of the canal, and we also admit that the state has a right, whenever it may see fit to do so, to abandon the canal, and that in case of such abandonment the owners of water rights and privileges are without redress for whatever injury they may sustain.

We not only concede these propositions, but we also agree with the authorities cited on this point by counsel for the defendant in error. But what we contend is, that while the state has a right to abandon a canal, it must abandon it in a lawful manner—its act of abandonment must be valid—and until it does validly abandon there is no abandonment in law, and those having water rights and privileges have a right to complain and invoke the power of the Courts for their protection.

The cases of

Fox v. *Cincinnati*, 104 U. S., 783,
Hubbard v. *Toledo*, 21 O. S., 379,
Malone v. *Toledo*, 28 O. S., 643,

and all the other cases cited by counsel for defendant in error to the same point are without application to this particular case, for the reason that in all those cases there was no question, as there is here, about the validity of the act of abandonment. On the contrary, in all those cases it was conceded that there had been abandonment, the validity of which was not called in question, and the only controversy was, conceding abandonment, as to whether or not the owners of water rights and privileges had a right to complain, and no Court in any one of those cases went any further than to hold that, conceding there had been abandonment, owners of water rights and privileges had no right of action.

It is elementary that if a law is, in its nature, a contract, and rights have become established thereunder, it can not be repealed.

Fletcher v. *Peck*, 6 Cranch., page 86.

In 1831 this state passed an act proposing, with the assent of Congress, to take under its care that portion of the Cumberland road within its limits, and to apply the tolls to the repair of the road, and containing a proviso exempting toll for the passage of any stage or coach conveying the property of the United States and persons in its service. Congress passed a law assenting to this act.

In 1831, Pennsylvania, about two months after the passage of the law of Ohio, passed a similar act.

In 1836, the Legislature of Pennsylvania passed an act imposing a toll upon carriages carrying the mail of the United States over that part of the Cumberland road within the state. The Court held this act to be in conflict with the compact between the state and the United States under which the state took possession of the road. To same effect, *McGhee* v. *Mathis*, 4 Wall., 145; *Lake Superior R. R. Co.* v. *United States*, 3 Otto, 442; *Green* v. *Biddle*, 8 Wheaton, 1.

A contract of a state with another state or with an individual, whether it assumes the form of a grant or not, is a contract within the prohibition of the Constitution of the United States. *New Jersey* v. *Wilson*, 7 Cranch., 164; *Fletcher* v. *Peck*, 6 Cranch., 87; *Providence Bank* v. *Billings*, 4 Pet., 560; *Woodruff* v. *Trapnall*, 10 How., 190; *Wabash, etc., Co.* v. *Beers*, 2 Black, 448.

The constitutional inhibition against impairment of contractual obligations applies to every contract which a state law can affect. A contract between two states, or a contract between a state and an individual, or a contract between a state and the United States, is a contract within the sense of this clause, and its inviolability will be protected.

The action of the defendant in error authorized by the act of the General Assembly of Ohio, passed May 18th, 1894, will, if allowed, disturb the rights of plaintiffs in error, which are vested rights, secured by contract, in the enjoyment of which they are entitled to protection until there is a valid termination of the compact between the United States and the state of Ohio.

V.

The contention of counsel for defendant in error that the plaintiffs in error are without relief because not parties to the contract between the United States and the state of Ohio is not tenable, because the contract in question is the contract of all the citizens of the state of Ohio, made on their behalf by the state, acting in its sovereign capacity as their agent. The contract in question is not to be likened to an agreement between individuals as to their individual rights, nor to a contract between individuals for the benefit of third parties. In this case the contract is between sovereignties, and sovereignties acting only as agencies.

The plaintiffs in error are not therefore merely beneficiaries, but they are more than this. They are principals for whom the intangible power of sovereignty has acted as their agency. Their proper relation to the contract appears when it is recalled that governments are created for the benefit of the people. What these agencies of the people do they do for the people, and in the name of the people, and their contracts are the contracts of the people. This is not therefore a case where the plaintiffs in error have an interest in a contract between other parties, to which contract the plaintiffs in error are strangers, but a case where the contract is their own contract, made in their name and by their authority—by their governmental agency—and therefore a contract to which they are directly related, and upon the provisions of which they have a right to rely.

It is true that the contract made by the state acting in its statal capacity might also be abandoned by the state, so acting, without any express consent or direction from the people of the state, because the powers delegated to the state government when it was established included such right and authority ; but this fact does not contravene the proposition that the people of the state are still the real parties to the contract, nor does it dispense with the necessity in this instance of the state securing the consent of the United States to an abandonment of the contract as a condition precedent to its act of abandonment, nor preclude those who have acted, as the plaintiffs in error have, upon the faith of a full performance of the contract, or a lawful abandonment of the same, insisting upon such performance, or such consent or agreement

on the part of the United States as may be essential to the validity of abandonment by the state.

VI.

The act of the General Assembly of the state of Ohio, passed May 18th, 1894, was invalid for the further reason that the act of the Legislature of Ohio undertook to grant a greater title in the "Hocking Canal" to the railroad than the state of Ohio possessed.

The title to the state of Ohio in that part of the Hocking Canal between Carroll and Lancaster is not a title in fee simple, as is the title to the remainder of the canal property of Ohio, including the remaining portions of the Hocking Canal beyond Lancaster, but simply an easement for canal purposes.

The state of Ohio came into possession of that part of the Hocking Canal which lies between Carroll and Lancaster by purchase from the Lancaster Lateral Canal Company, a private corporation, which constructed the canal under the authority of its charter as received from the Ohio Legislature.

The state of Ohio, under an act entitled "An act to provide for the general improvement of the state of Ohio by navigable canals." passed February 4th, 1825 (See 2 Chase, page 1475, section 8), constructed the general canal system of the state, and under said act had authority to take land by purchase or gift, and also to appropriate land that was necessary in the construction and maintenance of said canal system. The title to all land appropriated under this act which vested in the state of Ohio, was expressly provided by that statute to be a fee simple title.

But the title which the state of Ohio acquired in that part of the Hocking Canal which lies between Carroll and Lancaster, is an entirely different title from that which it acquired in lands appropriated under the general canal act of 1825. (See volume 24, Ohio Laws, 71). By its act of incorporation, the Lancaster Lateral Canal Company was constituted and declared a body corporate and politic "for the purpose of making a navigable canal from the town of Lancaster to such point of the Ohio Canal as shall be found most eligible."

Afterwards, to-wit: March 9, 1838, by authority of an act entitled "An act to authorize the Board of Public Works to pur-

chase for the use of the state of Ohio, the Lancaster Lateral Canal," said Lancaster Lateral Canal was purchased by the state of Ohio, and, thereupon, became in fact and in law a part and parcel of what is now known as the Hocking Canal, and is embraced in the act of abandonment in question.

The act of incorporation of the Lancaster Lateral Canal Company specially provided that the title which this company should have in lands which they appropriated for the purpose of constructing their canal should be "to the extent and for the purpose set forth in or contemplated by this act."

The Supreme Court of Ohio held in this case upon the facts shown in this Record, that the title of the Lancaster Lateral Canal Company was not in fee simple, but only an easement (page 39, Walsh Record), and that Court also held in the same case that the state of Ohio took from the Lateral Company only an easement; and that in the case of abandonment by either the Lateral Company or the state the lands would have reverted, but undertook to avoid the consequences of this view by holding that there was not an abandonment, but only a change in the nature of the highway to which the use of the property was to be subjected. (Pages 39 and 40, Walsh Record).

This holding does not change the fact that the state, by the act of May 18th, 1894, undertook to grant a greater title than it had in this property, and, if so, the grant in this case, as in any other, must for that reason be held to be void.

Where the state makes a grant and purports to give a greater title than it possesses, the grant is void. This doctrine prevailed at common law by which grants from the Crown could be avoided in three ways, the first of which was where the grant professes to give a greater estate than it (the Crown) possessed in the subject matter of the grant.

Am. & Eng. Ency. of Law, Vol. 9, page 45, "Grants."

Public grants are to be construed strictly, not extended by implication. *Jackson* v. *Lamphire*, 3 Pet., 280; *Beaty* v. *Knowler*, 4 Pet., 152; *Providence Bank* v. *Billings*, 4 Pet., 514.

Respectfully submitted,

J. B. FORAKER,

Of Counsel for Plaintiff in Error.

April 6, 1899.

No. 316, 317, 318

Brief for Defendant in Error

The Supreme Court U. S.
FILED
DEC 10 1898
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

Filed Dec. 10, 1898.

JOHN S. WILLIS,

No. 16901. vs.

THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

ROBERT WRIGHT,

No. 16902. vs. 317

THE SAME.

MICHAEL S. VOUGHT,

No. 16903. vs. 318

THE SAME.

BRIEF FOR DEFENDANT IN ERROR.

C. H. GROSVENOR,
Of Counsel for Defendant in Error.

COLUMBUS:
PRESS OF SPAHR AND GLENN,
1898.

Supreme Court of the United States.

JOHN J. WALSH,

No. 16901. vs.

THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

ROBERT WRIGHT,

No. 16902. vs.

THE SAME.

MICHAEL S. VOUGHT,

No. 16903. vs.

THE SAME.

BRIEF FOR DEFENDANT IN ERROR.

MOTION TO DISMISS THE PETITION IN ERROR TO REVERSE THE SUPREME COURT OF THE STATE OF OHIO.

This is a motion to dismiss a petition in error to reverse the Supreme Court of Ohio in the four several actions named in the caption of this brief, and this argument is offered in support of said motion.

It is, probably, proper to say, in this connection, that this is a contest between The Columbus, Hocking Valley & Athens Railroad Company, a corporation duly organized under the laws of the State of Ohio, and organized to build

a railroad line from Athens to Columbus, paralleling The Columbus, Hocking Valley & Toledo Railroad Company's line, and the latter Company. This is the real controversy. The people of Ohio, the owners of the public works of Ohio, have never authorized any of this litigation; it is simply and solely a contest between these two rival lines. The filing of this petition in error and the writ of *supersedeas* thereunder could have, in my judgment, but one effect, and that would be to delay and hinder the construction of the defendant's railroad line and perpetuate, to that extent, the monopoly of The Columbus, Hocking Valley & Toledo Railroad Company. This litigation has been long drawn out, and the real party in interest has never made his appearance by name in the Courts, but this has not misled anyone, and everybody understands who the real parties to the contest are. This will not militate against the allowance of this motion, if there is a substantial ground to permit the motion to be filed, but I do not hesitate to submit to the Court that the reasons here assigned do justify a careful examination of this question to the end that needless expenses and dilatory litigation may be avoided.

From the arguments made heretofore in the several Courts, in which these cases have made their appearance, it is easy to understand precisely what the questions sought to be made in this Court are, and in order that the motion may prevail it must appear to the satisfaction of the Judge, before whom the motion is heard, that there is no federal question involved here; no question in which the United States is interested, or, in the adjudication of which, it is competent to invoke the interference of the United States, or, that there is no right here guaranteed by the Constitution of the United States or the laws thereof, that the plain-

tiffs in error may invoke for their benefit. It is said that there are two federal questions here. The first is, that the abandonment of this canal is a violation of the contract between the federal government and the State of Ohio, by which certain aid was given by the federal government to the construction of the Ohio canal system; and,

Second, That the act in question violates Section X of Article I, of the Constitution of the United States, which ordains, that no State shall pass any bill impairing the obligation of contracts, and under this second head might be all the objections which can be asserted by the plaintiffs in error.

The plaintiff in this case must stand upon one of the two following grounds: Either, first, he must come here by virtue of his relation to the record and by virtue of the condition of the record, or, secondly, he must come here because he has a right, by assignment or by substitution or subrogation, to the rights of somebody else. The United States was never a party to this litigation, and I may state here, with full knowledge of the precise facts, that the Attorney General of the United States was repeatedly appealed to, by counsel for the railroad company, to intervene in the minor Court and ask that the United States be made a party and that litigation might proceed, but the Attorney General, very properly, refused to have anything to do with it. So, let us see what ground is there and what semblance of right is there to claim that Shotwell, (I will take him as the figure-head of the transaction) may invoke some interest of the United States in this subject matter and have those rights subjugated to his interest? Suppose a fruit vender has obtained a lease from the United States to occupy a place in one of the public buildings at Washington to vend his wares for all time, and then the United States sells the property to

somebody else, can this vender of fruit invoke the aid of the United States Government to uphold his lease? This is not wholly pertinent and not altogether "on all fours," but I maintain that it is absolutely too late; that the rights of the United States in these canals, whatever they may be, and I do not care very much what, are to be cared for, and handled, and abandoned and forfeited and sold by the State of Ohio, upon its own motion and in its own way, and until the United States becomes a party to some litigation growing out of them, no intervener, having had some sort of interest of somebody else, can invoke the aid of the United States to prosecute, in their behalf, an action of this character. So it is claimed, on behalf of the defendant, that the record is fatal to the claim of the plaintiff in that he seeks to be benefited by a right that he had under some legislation of the United States, which the United States refuses to insist upon. So much for my first proposition.

This case was tried in the Supreme Court of Ohio, and the Supreme Court rendered a decision, under six heads, and settled every question that can possibly be made here, and the only question that can be made here is, whether the Supreme Court of Ohio erred as to the questions involved in the proposition of the plaintiffs here.

From time immemorial the Supreme Court of Ohio has held just what this case decided, as follows:

"Contracts made with the Board of Public Works or other agents of the State, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the State, and no action will lie against the State for damages resulting from such abandonment."

Questions of the right of the lessees of the water of the canal have been heard and determined in the Supreme

Court of Ohio for so many years that no one disputes the authority of those decisions now in this State. The general result of the whole of it is that by the act of 1825, under which this canal was constructed, the State of Ohio took a fee simple title to this land, and it is said that they have leased certain water rights and violated the terms of their contracts, and if that be so, the plaintiffs in this case have a right to sue the State of Ohio for damages, but that they have a right of that character has been negatived in the numerous cases cited by the Supreme Court.

In the decision now under consideration the result of the entire litigation in the State of Ohio is as follows:

First—That the canals were constructed for the purpose of navigation, and that alone;

Second—That the only power that the Board of Public Works had to lease water rights or make any stipulations in regard to the use of the canals, was a right incidental to and subject to the major proposition in the first paragraph here;

Third—That the State had a right by legislation to abandon any part or all of the canal system of the State;

Fourth—That upon such abandonment the leases of water rights, whatever they may have been, and the limitations upon the use of the canals all terminated because of their incidental character, and that the owners of such rights or their assigns had no right whatever against the State or anybody else.

That is the result of these decisions, and so, acting under the force of these opinions, in the act of the State of Ohio abandoning the Muskingum River Improvement, which was a part of the canal system, and in the act of Congress accepting the gift and dedication to the use of the government of the Muskingum River Improvement, care was taken

to reserve, by grant of Congress, the existing water rights along the Muskingum River. This was done as a matter of grace and with the full knowledge and understanding of Congress that unless such a provision was put into the law, the water rights would fall valueless and non-enforcible. The propositions here stated are fully sustained in the cases of—

State ex rel v. *Railway Co.*, 53 O. S. R., 189, 243;
State of Ohio v. *Snook et al.*, 53 O. S. R., 121;
Malone v. *Toledo*, 34 O. S. R., 541;
Hubbard v. *Toledo*, 21 O. S. R., 379; and
Fox v. *Cincinnati*, 33 O. S. R., 492.

In the latter case the Supreme Court of the United States has settled the only real question in this case, in my opinion. In *Fox* v. *Cincinnati*, 104 U. S., 783, Chief Justice WAITE in delivering the opinion, said:

"The right to abandon follows necessarily from the right to build," and again, "Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the State to discontinue these canals and stop his supply of water."

The other cases cited are all predicated upon the fourth branch of the syllabus of *Hubbard* v. *Toledo*, 21 O. S. R., 379, where the Court uses this language:

The abandonment of her public canals by the State creates no liability on her part to respond in damages resulting therefrom to parties holding leases of surplus water."

In *Malone* v. *Toledo*, 28 O. S. R., 643, the Supreme Court lays down the law in the syllabus as follows:

1st. "The State having, by its proper agencies, appropriated property in fee for the public uses of canals, it is within the power of the Legislature to authorize a change from one public use to another of a like kind."

2d. "The State, by its Canal Commissioners, having appropriated property in fee for the purposes of a canal, it was competent for the Legislature to devote such property to the uses of a public highway, such as the street of a city, without working a reversion in favor of the owner of the soil."

And it is for the Supreme Court of the State of Ohio to say what construction shall be put upon her own statutes and the operation of her own constitution. So, this Court has already decided this question and I will not pursue it further. The result of all these decisions by the State and United States Courts is, that neither one of the parties to this record have any rights at all. They have not the shadow of a right. They have not the suspicion of a right. They dealt with the State with their eyes wide open. They dealt with the State with a full knowledge of the power of the State in this behalf, and to now come and say that they have a right, not only to insist upon a remedy for themselves, but have a right to invoke the action of the United States of America to aid them in enforcing a right that does not exist, will not be, for a moment, contemplated.

Now, I come to the second proposition, that, under the act of Congress, granting to the State of Ohio certain aid in the construction of her canals, that there is an existing contract between the United States and the State of Ohio which cannot be abandoned by any act of the Legislature affecting the canals. In this connection it is proper to say that the act of the Legislature sought to be declared unconstitutional does not commit to a private corporation the use and ownership of this right of way. A railroad company is not a private corporation within the meaning of the grant of aid to the Ohio canal system. It is admitted by counsel for

plaintiff in error that the fair construction of the act of Congress was that the canal system of the State should "forever remain public highways for the use of the Government and all citizens." We might stop right here and say that this is a "public highway for the use of the Government and all citizens" within the meaning of that act, and that the whole thing complained of is simply a change of the character of the highway from a canal—and I may say a canal that has not had any water in it for ten years—to a railroad. That is all. Grant now that there is a binding obligation upon the State of Ohio to maintain the right of the United States to occupy this right of way with a public road, for the use of the government and the people, will anyone pretend to say that the transfer from a canal to a railroad is an abandonment that purpose? But we do not stand upon that ground alone.

Now, it is seriously claimed that there is a contract between the State of Ohio and the United States Government, which should have a construction by the Supreme Court of the United States, which will compel the State of Ohio to forever maintain the canal system of the State. More than half of it is to-day, practically, abandoned. There is not one-fourth of it that is in a navigable condition. Miles upon miles of it have been handed over to adjoining land-owners, and all sorts of re-occupation and re-dedication have been made, and now it is claimed that every man along the line of these abandoned canals, running up into hundreds of miles, may come into the courts of the country and invoke the participation of the United States Government, as a party, to force the State of Ohio to rehabilitate and rebuild these canals. By this construction, the United States was guilty of a breach of contract, that every citizen has a right

to insist upon, when they accepted the transfer of the Muskingum River improvement to the General Government, and if there was a contract by which the State of Ohio was to maintain and work in perpetuity that improvement, its transfer to the United States was a plain abandonment and violation of contract.

I.

It is difficult to treat with becoming seriousness an argument which insists that the United States Government, because it aided in the construction of a canal or canals in the State of Ohio nearly three-quarters of a century ago, has now the power to dictate the use or uses of such canal or canals. It is hard to bring one's mind to contemplate the full scope and ultimate result of such an argument. There never was a better case for the application of the argument *ad absurdum*.

If it be true that by accepting the aid of the Government the State of Ohio entered into a contract with the United States which to-day appears to make it unlawful and unconstitutional for the State to abandon, to lease, or to sell any portion of its public works thus aided by the General Government, then the incidents of a contract adhere and remain. If the Government did not acquire a beneficial interest in the contract, then its abandonment, by the State, works no hardship to the General Government or its interests. If it did acquire an interest in the property in the nature of a contract right to have the use and benefit of the property then all the incidents of ownership adhere.

Now, what are they? According to the argument the State of Ohio agreed that, in consideration of some aid by the General Government in the construction of its canal

system, the United States should forever have the right to transport its mails and passengers and arms, and munitions of war over and along these canals. What is involved in this contract? Why necessarily there is involved the duty of the State of Ohio to forever, during all time, to maintain in a navigable condition all of its canals, because if the United States has a right to protest against the abandonment of the canal, it has a like right to insist upon the property being kept as a canal. There is no escape from this argument and I suppose counsel on the other side will not attempt to escape, and I presume that he means to be understood as claiming that the United States has a proprietary interest in these canals, and as an instance thereof the State has contracted to maintain and keep in a navigable order for all time these water-ways.

HOW HAVE THE PARTIES TO THIS PRETENDED CONTRACT TREATED THE SUBJECT MATTER THEREOF?

For more than twenty years the State of Ohio has been abandoning portions of its canal system, and it will be presumed, and conclusively presumed by the Court that the United States Government has had full knowledge of that fact. It has not been done in the dark. Great factories are standing on canal land, by authority of the acts of the Ohio Legislature in the matters of abandonment. The hum of machinery and the roar of industry has taken the place of the croaking of the bullfrog, and the swish of the old time canal boat.

In 1870 the Ohio Legislature abandoned a portion of the Hocking Canal. In 1875 it abandoned fourteen miles more, and to-day, by the authority of the State of Ohio, the Columbus, Hocking Valley and Toledo Railway, *the putative*

client of the able counsel on the other side of this case, is operating its railroad where heretofore the canal lay. All over the State, without going into particulars, the same thing has been done—at Cleveland, at Akron and at other points.

Not only so, but the State of Ohio has abandoned the Muskingum Improvement and the General Government had full knowledge of it, for it accepted the cession of it to the General Government by the act of Congress itself.

Everywhere along the Ohio Canal from Cleveland to Portsmouth, the State of Ohio, for twenty-five years, has been granting rights equivalent to vacations of property of the canal, or its berme bank, to other parties. The same is true in the City of Columbus. Permanent rights have grown up, under acts of the Legislature, inconsistent with a property right of the Government of the United States and yet not one word of protest has ever been made by the United States Government and it does not protest now.

What then is our position? It is this. If there is in the judicial mind a question as to what the effect of the original arrangement was the parties to the alleged contract have placed their own construction upon it, and that construction is this:

"The State of Ohio desires to build certain canals. The General Government is willing to aid the State. The General Government, however, will require that so long as the canals, thus to be aided, are maintained as canals by the State that the General Government shall have the right to transport its mails, its troops, and its munitions, free of charge, over the lines of the canals."

But when the State of Ohio ceases to use it as a canal there is no right in the General Government to insist that it shall be maintained. I maintain and insist that if the General Government has, by the operation of this pretended

contract, such an interest as will allow it to interfere in this action, then it has a right by mandatory process to compel the State of Ohio to maintain its waterways and keep them in navigable order, or else it has a right to sue and recover damages for the breach of this contract. That is the position into which our friends are inevitably driven. A contract which is of such a character that it can be set up in bar of the constitutionality of an act of the Legislature is one, the specific performance of which can be demanded in a Court of Justice if there is no adequate remedy in case of abandonment. It would be a beautiful condition of things, a splendid result, if in this year of grace it should be decided by this Court that the United States of America can come into the Courts of Ohio, and either recover damages for the unlawful abandonment of the canals, or else compel the State of Ohio to go on through all time to come maintaining the obsolete waterways.

This arrangement between the parties must be considered in the light of the conditions in which we live. We are living in the nineteenth century, and this contract was made in the light of the nineteenth century, if it is a contract, and it was made in the light of the progress of the State of Ohio, of the nation, and of the world.

By force of that progress the lines of the canals in Ohio have been gridironed with railroads, and to say that the State of Ohio shall not be permitted to promote this great engine of civilization, this mighty force of progress, by the abandonment of its lines of waterways, is to hold that the contracts of the arrangements for the development of our State were made in such a way as to forever bar growth and to hinder progress.

The State of Ohio received aid from the General Government in the construction of its State roads, and hundreds

of miles of road in Ohio were built, in part, with the money furnished by the Government, and the identical terms are used in those instances as in these canal grants. The Government was not to be assessed any toll, and was always to have the free right-of-way upon them. The State and its authorities have, in portions of the State, abandoned hundreds of miles of these roads, re-established them upon other lines, and the Government has sat by and has never interfered.

Thus the parties to this arrangement have put their own construction upon it, and at the end of twenty odd years of operation under this construction it is too late now for the Government itself to set up any such claim as is here presented.

ANOTHER VIEW.

But the arrangement was not in the nature of giving to the United States a right of ownership in the property. It was simply a stipulation, an agreement, that it might forever transport its property upon these lines of canals free. It was an agreement, if you please, if it was enforceable at all, which is enforceable in a Court in an action for damages. The State of Ohio said, in consideration of the aid rendered, you can transport your property free over these canals. When the General Government presents its mails, its troops, its property for transportation, and is refused, then, and not until then, will there be even a breach of the contract, as between these parties.

It is very strange that the United States Government should be permitted here, by proxy, and by unauthorized proxy, and a proxy which is in fact a fraud upon the United States Government, to come into Court and object to the abandonment of one of the State's canals when there is no

averment or pretense that there has been a breach of this contract.

But now it is said that the act is unconstitutional because it impairs the validity of a contract.

It is not important to discuss the question raised in the case at Fairfield County, growing out of the rights of a miller there, as I am not familiar with the allegations of the petition, and in as much as that case is not involved in this in so far as the immediate rights of the plaintiff are concerned.

In this case it is enough to say that the lease, or pretended lease of water by the Board of Public Works to the plaintiff, Shotwell, was a lease of the surplus water so long as the canal was in operation. Whatever the terms of the lease may be I care not. The lease stands charged with the law of the case, and our Supreme Court has so often held that it was beyond the power of the Board of Public Works to bind the State, except to lease the surplus water during the time when the canals are in active operation, that it is not necessary to reply further.

Shotwell's contract, then, is an illegal contract if it did not fail by its own terms when the canal was abandoned. If there is anything in that contract which attempts to go beyond the leasing of the surplus water of the canal while the canal was in operation that contract was void from the beginning, and Shotwell is charged with full knowledge of that fact. He cannot set up a want of knowledge for it is a matter of public notoriety and of public knowledge, made so by the law itself.

So far as Shotwell is concerned we have that lease. He has a contract which is illegal and void. He comes into Court and says "this act is unconstitutional, because it

impairs the validity of a contract," which is of itself illegal, and which he cannot enforce. Suppose the canal was not abandoned, and suppose the Board of Public Works should give notice to Mr. Shotwell that there was no longer surplus water, and that they will no longer continue to supply water. He has taken his lease with the probability of just such a thing happening, and he cannot be benefited, and yet it is claimed that this same man, without any rights whatever under his contract, may come into this Court and be heard to say that this statement is unconstitutional because it puts an end to his contract.

THE AUTHORITIES CITED BY COUNSEL ON THE OTHER SIDE.

I have most carefully examined the cases cited by learned counsel on the other side, in 6 Cranch, 3 Howard and 4 Wallace, and 93 U. S. Otto, and, with all due respect to the eminent gentleman, I maintain without qualification or hesitation, that there is not one single word, syllable, or sentence that sustains the position taken by the counsel on the other side. In other words, these authorities have not the slightest application to this case, and I beg Your Honor to read them in full.

The case in Cranch was a case where the State of Georgia sold certain land with a condition and limitation upon the character of the grant, and in a suit between the parties, Chief Justice MARSHALL held that the attempt of the Legislature to revoke a grant of land which it owned, or which it sold for cash, was a violation of the contract of the State, and who would doubt it?

But the other cases in Howard and Wallace are so palpably ineffectual, for the purpose claimed on the other side, that I am surprised that they should have been cited by learned counsel.

The Government of the United States has acquired the right-of-way and builded certain roads, with which we are all familiar. The roads led out from Washington and the East across the States of Pennsylvania, Virginia and Ohio. They were owned by the Government; they were not subsidized by the Government; they were owned by the Government. In so far as a political organization can be the owner of roads the United States owned these roads absolutely.

The Government had gotten out of the use of the roads. It had gotten tired, you might say, of keeping up the repairs and improvements, and it said to the States of Ohio and Pennsylvania, you may improve these roads and have the control of them, up to a certain extent, but you shall not charge people riding in the United States mail coaches, toll on the roads. Beyond that you may do just as you please. What was the effect? They did charge these people toll. The Government said, we own this property, it is our property, and you are only the lessee of it, as it were, and you have a right to it only under the limitations which we have prescribed and laid down. You must live up to your contract; if you do not you cannot have possession of the property. That is all there is of it, and I am amazed that they should be cited, and there is only one favorable thing to be considered in this connection, and that is that it indicates that there is no authority in the United States to sustain the position of the defense.

The United States Government had not surrendered up its title in that case. The United States Government had no title in this case. It never had any title; it was the canal property of the State of Ohio. It was the property of the State in absolute fee simple title, and the United States Government said to the State of Ohio, we will give you so much money to enable you to finish up these canals, and

when you have got them done, the single thing which we ask of you is that you shall not charge tolls upon our commodities; that they shall go free over your lines. That is all there is of it.

Then the parties to that transaction—call it a contract, if you will. It was a contract that the State of Ohio would never, while running the canals, charge the Government toll. That is true. Nobody will doubt that, but the contract was not a contract that was enforceable against the title of the property; it does not effect the title of the property; it was a mere stipulation, and I maintain my original position, and I challenge successful contradiction, that in order that this Court shall uphold the position of counsel on the other side, this Court must go to the absurd length of holding that the United States has such a proprietary interest in this property, of a contractorial character, that it can enforce in a Court of Equity this contract. If it can maintain its contract for the purpose of defeating the abandonment of the canal by the State, that very fact gives it power to compel the State to repair, rebuild, and continue to carry.

The very roads which counsel cites, and which were the subject matter of the litigation in Howard and Wallace, have been abandoned by the State of Ohio, and the State is not exercising authority over a single foot of any one of the roads, and the same is true in Pennsylvania and Virginia.

The Government stood by and acquiesced, and when the States failed to further carry out their agreements, the Government itself abandoned these roads as your Honor well knows.

The terms of the contract were insisted upon solely and simply while the property was being operated by the States, and no further consideration given to it as soon as the abandonment was decreed.

NOW, THE RECAPITULATION.

First—The act of Congress making a donation to aid in the building of the Ohio canals, and the acceptance by the State, bound the State only to carry, while the canals were in use as such, the property of the United States free of charge. Nothing can be added to that contract by inference or construction.

Second—The State is not bound to maintain the canals beyond the will of the State in that behalf, for the reasons, (*a.*), the contract does not so read; and (*b.*), the parties to the transaction have put their own construction upon it by repeated, open, and notorious acts.

Third—The plaintiff in this action, not being a party or privy to the agreement between the State and the General Government, cannot assert the rights of the General Government here, even though such rights exist.

Fourth—The General Government having stood by with full knowledge, conclusively presumed, of the various acts of abandonment by the State, it is estopped now to object, because it would be a fraud upon the persons having acquired rights under such acts, as well as upon the State itself, which has adopted the policy of abandonment, and exerted the right to abandon for a quarter of a century without protest from the General Government.

Fifth—The authorities cited by counsel for the plaintiff have no application to the case at bar, for the reasons heretofore stated.

Sixth—The age in which we live, progressive and aggressive, is abandoning canals where they are valueless and useless, and no owner of a sprinkling cart can be heard to dispute the right of the State to march forward.

C. H. GROSVENOR,
Of Counsel for Defendant in Error.

FILED
DEC 12 1898

Supreme Court of the United States.

Filed Dec 12, 1898.

No. 16901. JOHN C. WALSH
vs.
THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

No. 16902. ROBERT WRIGHT
vs.
THE SAME.

No. 16903. MICHAEL S. VOUGHT
vs.
THE SAME.

BRIEF FOR DEFENDANT IN ERROR.

D. L. SLEEPER,
JOHN J. STODDART,
Of Counsel for Defendants in Error.

COLUMBUS:
PRESS OF SPAHR AND GLENN,
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Supreme Court of the United States.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

There are three cases pending against this defendant in error in this Court, brought by John J. Walsh, Robert Wright and Michael S. Vought, respectively. All of said actions seek to restrain the defendant in error from taking possession of the Hocking Canal and constructing thereon a railroad under authority of an act passed by the Legislature of Ohio, May 18th, 1894, entitled "An act to provide for the abandonment of the Hocking Canal for canal purposes, and for leasing the same to The Columbus, Hocking Valley & Athens Railroad Company."

These actions are all founded upon practically the same ground, to wit, the unconstitutionality of said act.

Walsh is the owner of lands on both sides of, and adjoining said canal property, and claims that the State has an easement in said canal property for canal purposes only, and has no right to grant to said railroad company the privilege of constructing thereon a railroad, which he claims would lay additional burdens on his lands.

Wright claims a contract with the State whereby the State is bound forever to maintain a dam across the Hocking River at a point above his grist mill near Logan, Ohio, so as to furnish a sufficient supply of water both for said canal and said grist mill. His petition discloses that the river at that point is the sole source of supply for both the canal and the grist mill, but it does not indicate how the abandonment of the canal could fail to increase the supply of water to the mill. He also claims that said railroad would of necessity cross several lanes and highways through his premises, and that he, being the owner of one thousand acres, would be greatly injured thereby.

Vought claims that the Hocking Canal skirts the north and east sides of his lands and serves to catch and carry away waters from the same, and that seventeen miles of drain tile laid upon his farm and emptying into said canal would be rendered worthless by said abandonment; and in substance asks that the canal may be maintained for the purpose of draining his farm. He does not claim to have any interest in the canal property, or that the same was ever a part of his premises.

In all three cases it is alleged that a compact was entered into between the United States Government and the State of Ohio, by an act of Congress, passed May 24th, 1828, by

which the United States granted to the State of Ohio 500,000 acres of land within the State for the purpose, and upon the condition in said act contained, that said lands should be sold and the proceeds applied to the construction and completion of the canals already commenced; and further providing, in section 5 thereof: "Provided, that said canals when completed *or used* shall be and forever remain public highways for the use of the government of the United States, free from any toll or charge whatever, for any property of the United States or persons in their service passing along the same;" which said cession of lands was accepted by an act of the General Assembly of Ohio passed December 22, 1828.

It is claimed in all three cases by the plaintiffs in error, that the abandonment of the Hocking Canal impaired the obligation of this alleged compact.

In the petitions of Walsh and Vought this alleged compact or agreement is the only contract mentioned. In the petition of Wright this compact is pleaded, and also a contract between the former owners of his land and the State, under the act of March 23, 1840, whereby it is claimed the State agreed forever to maintain a mill dam above his grist mill for the purpose of supplying water to said canal and to his mill.

CLAIMS.

First.—Said act of abandonment does not impair the obligation of any contract between the State and Nation, or between the State and Mr. Wright; the only contracts pleaded in these three cases.

Second.—The defendant in error denies that said alleged compact or agreement between the state and national gov-

ernments bound the former to maintain its canals forever for the purpose simply of furnishing free transportation to the latter for its property and persons in its service, but claims that it simply bound the State to grant the free use of said canals to the government so long as said canals should be used for canal purposes.

Third.—Defendant in error denies the power of the Board of Public Works to enter into a contract with the predecessors of Mr. Wright to forever maintain said mill dam.

Fourth.—Defendant in error denies that the petition of Mr. Wright alleges any violation of said contract by said act of abandonment.

ARGUMENT.

FIRST.

The said act of abandonment does not impair the obligation of any contract between the State and Nation, or between the State and Mr. Wright, the only contracts complained of in these three cases.

When the Federal Government conveyed to the State of Ohio 500,000 acres of land to be sold and the proceeds applied toward the construction of the canals of said state, and provided that "The said canals when completed *or used*, shall be and remain forever public highways for the use of the Government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service, passing along the same," the arrangement was solely between the State and National governments. It was not for the benefit of any one citizen as distinguished from the others. It was not provided that a

citizen along the line of the canal should be guaranteed the perpetual use of any accidental benefit that might arise to him by reason of his location. It is not claimed by anyone that the State can be compelled to maintain its canals. The Supreme Court of Ohio has repeatedly held that the State is not bound to maintain them for public uses. If it is not bound to maintain them for public uses, it cannot be bound to maintain them for private uses, and therefore it is not bound to maintain them to run grist mills. The object in making the canals is for public use, not private privilege, and when no longer maintained for the primary object, the private and accidental privilege must fall.

If any damage follows to Mr. Wright by reason of the fact that the State does not continue to maintain his mill dam, then he must seek redress in the ordinary way, but he cannot resume title to the land granted to the State for canal purposes by his predecessor in title. The fee to the land passed to the State, and is an executed grant with possession delivered. The State can grant and has granted the use of the land to the defendant company, and it takes the land as amply as the State had it, and the State having a fee simple title, the defendant took a ninety-nine year lease of that title.

The statute under which the State acquired title to the land granted by Mr. Wright's predecessor in title, provided only for the acquiring of a full fee simple title. No lesser title could be or was acquired. The title could not be conditioned upon the maintenance of the dam. It could not be a conditional title. The petition does not allege that it was a conditional title, and if it did so allege it could have no effect because no other than a fee simple title could have been taken. The statute under which the title was acquired did not authorize the agents of the State to take any condi-

tional title, and any provisions outside of their authority, such as providing to forever maintain a dam, or to forever furnish water to run a mill, was beyond their authority and absolutely void, and, therefore, no contract between the State and the mill owner to forever maintain the dam or the canal ever existed.

Such being the legal status of the parties, there cannot possibly be any impairment of the obligation of a contract between the State and Mr. Wright.

The reasoning of plaintiff's counsel seems to be that if the grant of lands by the National Government provided that the canals when completed or used were to remain forever public highways then he and his predecessors in title had the right to *presume* that the State would forever maintain the canals, and, therefore, he had a right to contract with the State to forever maintain his mill dam and supply water from the canal to run his mill.

The only object was to furnish means of transportation for the public benefit. There is nothing in the arrangement between the State and National Governments upon which to base a contract for private benefit. There is no privity of contract between these land owners and either the State or National Governments. The two governments are the only parties to the contract, and so long as they are satisfied with each other's conduct and observance of the terms of the arrangement, the plaintiffs cannot elect to be the guardians of the interests of either government. No right of any of these plaintiffs is guarded or considered in the arrangement. The only right that is guarded to any party is that when the canals are completed *or used* they shall be and forever remain public highways for the use of the government of the United States, free from

any toll or charge, for the property, and persons in its service, passing along the same. If the United States Government finds the method antiquated and has no use for it—desires the privilege no longer—then the proviso in the act is satisfied and has no force, and the State is absolved from whatever duty it owed. It is an established fact that the United States Government no longer uses these canals for the purposes mentioned in the proviso and has long ago discontinued such use. The object of the proviso is ended, and with it ended the effect of the proviso. No private person has any right to insist upon the continuance of a contract which the only parties to it have abandoned. If plaintiff based his contract for water power upon the maintenance of a mill dam upon the presumption or probability that the United States Government would always insist upon the canals being maintained, such presumption was no part of the contract, and the failure of his presumption throws no duty upon the State.

It must be further noticed that the proviso does not require the State to maintain these canals for any given time, but when they are "used" the privilege is in the Government to use them for the purposes mentioned. If they cease to be used, the United States Government cannot use them.

We therefore contend that no obligation of plaintiff's contract was impaired by the abandonment of this highway for canal purposes.

We have no difference with counsel for plaintiffs in error upon the decisions quoted in their brief as to the binding force of agreements between the National and State Governments, such as that in 3 Howard, 151. Those cases decide as to the effect of grants with a proviso and acceptance, as between the two governments—the parties to the

contract. In the case at bar neither of the two parties contracting are complaining. The complaint here comes from one who is complaining because the parties to the contract are satisfied, and his complaint is not for their benefit but solely for his own private benefit.

It is claimed that by constructing the railroad it will cut off and destroy access to different parts of Mr. Wright's lands lying on both sides of the canal, now had by means of cross roads. It is difficult to see why this should happen. The law provides how all crossings shall be maintained, and in this regard he has only the same right with all other citizens who use the public highways.

We have seen that Mr. Wright claims that his predecessors in title sold the ground over which the canal was built through his lands and allowed the appropriation of the waters of the Hocking River (Record, page 21) and the consideration to be claimed therefor was that the State agreed through its agents to enlarge and forever maintain the dam theretofore built across said river for the use of his mill, so as to afford an ample supply of water both for said canal and the mill. The land so sold passed into the possession of the State by fee title. The dam was enlarged. The State has complied with its contract, hence the consideration has been paid. When the State ceases to use the waters of the Hocking River for canal purposes, Mr. Wright has the total benefit of the dam with no diminution of the waters by use for the canal. The Canal Commissioners or Board of Public Works could not bind the State to maintain the dam after the State abandons the canals. Such power is not within the duties enjoined upon them. See

State ex rel., v. *Railway Co.*, 37 O. S., 174–175.

Mr. Wright nowhere directly alleges that the agents of the State agreed that water should be forever taken from the canal to run the mill. If, however, such agreement had been made it would not be binding on the State, because such agreement would likewise have been beyond the power of the State's agents.

"The right to surplus water and to lease the same for private uses, is an incident of the public use of the canal for purposes of navigation. The canals of the State were authorized, constructed and maintained for public purposes, and not to afford water power to be leased or sold, for private use. The latter use is subordinate, and the right to the same may be terminated whenever the State, in the exercise of its discretion, abandons or relinquishes the public use."

Elevator Co. v. *Cincinnati*, 30 O. S., 630, Syllabus.

"The obstruction of a navigable stream cannot be maintained to promote private interests. Hence, when the State abandoned the Manhattan Branch Canal, the aqueduct, a part thereof, spanning and obstructing Swan Creek, which is a navigable stream, became a common nuisance, to abate which any riparian proprietor injured thereby had the legal right to invoke judicial proceedings."

"The abandonment of her public canals by the State, creates no liability on her part, to respond in damages resulting therefrom to parties holding leases for 'surplus water,' under the act of March 23, 1840, 'To provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and the collection of tolls.'"

Hubbard v. *City of Toledo*, 21 O. S., 379, Syllabus.
Cooper v. *Williams*, 4 Ohio, 253.
Buckingham v. *Smith*, 10 Ohio, 288–297.

Hubbard v. *City of Toledo*, 21 O. S., 399.
Elevator Co. v. *Cincinnati*, 30 O. S., 630–646.
Fox v. *Cincinnati*, 33 O. S., 492; affirmed, 104 U. S., 783.
State ex rel. v. *Board of Public Works*, 42 O. S., 615.
Erkenbrecker v. *Cincinnati*, 2 C. S. C. R., 412.
Haldoman v. *Pa. R. R. Co.*, 50 Pa. St., 440–441.

Hence we arrive again at the conclusion that the State has fully performed everything that it is bound to perform arising out of its contract with Mr. Wright's predecessor, and that it owes no further duty to Mr. Wright, and the State owing no further duty, the grantee of the State owes no duty to Mr. Wright.

It follows that the plaintiffs have no part or interest in the arrangement between the United States Government and the State, and that no contract of plaintiffs is impaired by the transfer of the canal property to the defendant, and that the act of Congress making a donation to aid in building the Ohio canals, and the acceptance by the State, bound the State only to carry, while the canals were in use as such, the property of the United States free of charge. Nothing can be added to that contract by inference or construction.

The State is not bound to maintain the canals beyond the will of the State in that behalf, for the reasons (*a*) the contract does not so read; and (*b*) the parties to the transaction have put their own construction upon it by repeated, open and notorious acts.

The plaintiff in this action not being a party or privy to the agreement between the State and the General Government, cannot assert the rights of the General Government here, even though such rights exist.

The General Government having stood by with full knowledge conclusively presumed, of the various acts of abandonment by the State, it is estopped now to object, because it would be a fraud upon the persons having acquired rights under such acts, as well as upon the State itself, which has adopted the policy of abandonment, and exerted the right to abandon for a quarter of a century without protest from the General Government.

The age in which we live, progressive and aggressive, is abandoning canals where they are valueless and useless, and no owner of a mill dam can be heard to dispute the right of the State to march onward.

In *Fox* v. *Cincinnati*, 104 U. S., 783, Chief Justice WAITE, in delivering the opinion, said: "The right to abandon follows necessarily from the right to build," and again "Every lessee of power took with full notice of the reserved right of the State to discontinue these canals and stop his supply of water."

The subject of this case was the abandonment of the southern end of the Miami and Erie canal by the Legislature, and the granting of the same to the City of Cincinnati for a public highway for street and sewer purposes, by which plaintiff was deprived of water from said canal for power purposes at his mill, under a lease from the Board of Public Works. This case is on all fours with the case of Mr. Wright.

In a long line of decisions the Supreme Court of Ohio has repeatedly and uniformly held that the State has the power to abandon any portion of its canal system and to grant the same to a city for street purposes, and that the State has power to grant the use of the same to a railroad for railroad purposes, and that no right of action accrued to the

lessees of surplus water by reason of such abandonment. Let us review these cases briefly in their chronological order:

In *Hatch* v. *Railroad Company*, 18 O. S., 92, the Court held that the White Water Canal Company (a corporation created under a special act similar to that creating the Lancaster Lateral Canal Company, with the same powers and privileges), had the power to grant and convey its easement in the premises to a railroad company for railroad purposes. Hatch was the owner of land through which said White Water canal passed. He brought an action for damages upon the theory that the abandonment of the canal caused a reversion of the land to the owner of the fee, the plaintiff, and that he was entitled to the full value of the land thus appropriated and used by the railroad company for railroad purposes. The Court held, on the contrary, that the easement for railroad purposes was similar to that for canal purposes, as both were common carriers, and that the measure of damages was for any *additional* burden placed upon the land by reason of the change in the manner of transportation, and that he was not entitled to compensation for the value of the easement of the canal company.

In *Hubbard* v. *Toledo*, 21 O. S., 379, the Supreme Court of Ohio held, 1 Syl.: "The execution of a grant pursuant to the act of March 20th, 1864, 'To authorize the City of Toledo to enter and occupy a part of the Miami and Erie canal as a public highway, and for sewerage and water purposes,' was an abandonment by the State of that part of her public canals known as the Manhattan Branch."

4 Syl. "The abandonment of her public canals by the State creates no liability on her part to respond in damages resulting therefrom to parties holding leases for surplus

water, under the act of March 23, 1840, 'to provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and the collection of tolls.'"

This was an action brought by the plaintiff against Toledo to recover damages on the theory that by the act of abandonment the real estate had reverted to the owner of the fee. Judge WEST, in rendering the opinion of the Court, said:

"In view of the magnitude of the private interests which this opinion may effect, not only in its immediate consequence, but in the future history and disposition of the public canals, we have given to the questions arising upon this record, which it is deemed necessary to pass upon, the most careful consideration." Judgment was rendered in favor of the city.

In *Malone* v *Toledo*, 28 O. S., 643, the Court lays down the law in the Syllabi as follows:

1. Syl. "The State having, by its proper agencies, appropriated the property in fee for the public uses of the canals, it is within the power of the Legislature to authorize a change from one public use to another of a like kind."

2. Syl. "The State, by its Canal Commissoners, having appropriated property in fee for the purposes of a canal, it was competent for the Legislature to devote such property to the uses of a public highway, such as the street of a city without working a reversion in favor of the owner of the soil."

3. Syl. "The canal and street being both public highways, the uses of either are uses of a public nature and of a like kind; nor does the fact that water pipes and sewers are contemplated in the street make such use inconsistent with that to which it was formerly applied."

4. Syl. "Property was appropriated in fee by the State through its Canal Commissioners, for the purposes of a canal. Subsequent statutes gave the City of Toledo power to enter upon a portion of the appropriated premises and occupy the same 'as a public highway, and for the use of water pipes and sewerage purposes,' and also released to the city all right of the State in the premises in question. Under such legislation, one who claims to own a portion of the canal bed can not contest the right of the city, on the ground that the change of use authorized by the Legislature has terminated the public interest in the property."

This act was passed March 26, 1864, to abandon a portion of the Miami and Erie Canal and authorized the City of Toledo to enter upon and occupy the same as a highway and for sewerage and water purposes. The Court, in rendering its opinion, said:

"When real estate is so appropriated for one particular public purpose, the fact that it is, by legislative authority applied to another public purpose is not necessarily an abandonment, nor is it a forfeiture of the public interest. Instances are abundant in the legislation of the State where land has been taken for one purpose and used for another, without objection or complaint from anyone. Railroads cross highways, and no one has ever supposed that this was such an abandonment of the highway as that the soil reverted to the owner. So canals have been allowed to use portions of turnpikes. In the Chagrin Falls case, 2 O. S., 419, an ordinary road was converted into a plank road. And in Hatch's case a canal was converted into a railroad, but it was held that this did not work a reversion of the canal bed to the original proprietor. It is now every day's experience that streets are used by railroads. All these are instances

where public property was appropriated for one particular public use and afterwards, by legislative consent, applied to another of a like kind."

Malone v. *City of Toledo*, 28 O. S., 656.

In *Elevator Co.* v. *Cincinnati*, 30 O. S., 629, the Court held:

3. Syl. "The right to surplus water, and to lease the same for private uses is an incident of the public use of the canals for the purpose of navigation. The canals of the State were authorized, constructed and maintained for public purposes, and not to afford water power to be leased or sold for private use. The latter use is subordinate and the right to the same may be terminated whenever the State, in the exercise of its discretion, abandons or relinquishes the public use."

The plaintiff in this case complained of the abandonment of the lower end of the Miami and Erie canal, and its conversion into a public street, and the consequent loss of power for its elevator.

In *Fox* v. *Cincinnati*, 33 O. S., 492, the Supreme Court of Ohio held in favor of the city and the constitutionality of the act of abandonment and against the right of the defendant to recover damages by reason of loss of water power for his mill. This case was carried to the Supreme Court of the United States, to which decision we have above referred.

In *Fauger* v. *Board of Public Works*, 42 O. S., 607, the Supreme Court of Ohio held:

2. Syl. "The Board of Public Works is not authorized by said statute (March 23, 1840, 3 R. S., 417), to in any manner surrender, abridge, restrict or limit its power to resume at any time the surplus water leased or sold for hydraulic purposes," etc.

In *Canal Co.* v. *Commissioners*, 27 O. S., 14, the Court held that the act authorizing the canal company to abandon the canal was constitutional, and that the Commissioners had no right of action against said canal company to compel said company to pay for the repairs of certain bridges over said canal after its abandonment.

In *McComb* v. *Stewart*, 40 O. S., 647, the Court held that the right to use surplus water from the mill dam ceased and determined with the dissolution of the canal company and the abandonment of the canal.

For more than twenty years the State has been abandoning portions of its canal system without objection or protest on the part of the government. In 1870 the Legislature abandoned the lower end of the Hocking Canal, extending from Nelsonville to Athens, and The Columbus, Hocking Valley & Toledo Railroad occupied a large portion of said canal bed as its right of way, without any protest from any source. The State abandoned the Muskingum improvement with full knowledge on the part of the general government, who accepted the cession by act of Congress. There have been a large number of acts abandoning portions of said canal system.

In *State* v. *Snook*, 53 O. S., 521, the Court held:

1 Syl.: "Lands of which the State in any manner acquired possession, under the acts of February 4, 1825, (2 Chase 1472) and February 7, 1826, (24, O. L. 58) and used in the construction of its canals, became the property of the State in fee."

Judge SHAUCK in rendering the opinion said:

"The effect of the legislation looking to the establishment of the canal system of the State was that it acquired an unrestricted title in fee to all the lands of which it in

any manner took possession for the purposes of such construction." (53, O. S. 531.)

The defendant contends that the Hocking Canal was not included in the provisions of the act of Congress of 1828, donating the lands referred to in aid of the Ohio canals.

The State was then engaged in the construction of the Miami and Erie Canal between Toledo and Cincinnati, and the Ohio Canal between Cleveland and Portsmouth; and the Hocking Canal was not then contemplated. In 1826 the Lancaster Lateral Canal Company was incorporated and a branch built from the Ohio Canal to the city of Lancaster, a distance of twelve miles.

It was owned and operated by a private company until 1838 when the State purchased this canal and extended it to the village of Athens, and denominated it the "Hocking Canal." This land appropriated by Congress had been sold and the proceeds applied to the building of the two former canals before the Hocking Canal was constructed, and no portion of the money arising from the sale of said lands was actually applied in the construction of the Hocking Canal. These facts appear upon the statute books of the State and of Congress and were not admitted to be true by the demurrer.

But even assuming that the contract between the State and National Governments applied to the Hocking Canal, using the language of Judge PUGH, in the lower Court,

"What right have the plaintiffs to vex the defendant and use the public time of the Courts with their contention that the contract between the United States and the State of Ohio has been impaired by the Statute in question? They were not parties to it. The United States only can complain of the violation of the contract. There is no privity of

contract between the plaintiffs and the United States, nor was the contract made for their benefit."

"Justice MILLER said in *Grinnell* v. *Railroad*, 103 U. S., 744: "This plaintiff had no right to stir up a litigation which the parties interested did not desire to have started."

"In *Van Wick* v. *Knevals*, 106 U. S., 369, the Court said: "A third party cannot take upon himself to enforce conditions attached to a grant when the Government does not complain of their breach."

"And as to the contract with Wright's predecessor, it must be construed with reference to the law of the State then in force. That law entered into and became a part of the contract just as much as if it was there in express terms."

"The State is not bound by the acts of its agents unless it manifestly appears that they were acting within the scope of their authority, and individuals who deal with them must take notice of the nature and limitations of the authority conferred by law upon a person acting in an official capacity."

"The law then in force required the Board of Public Works to reserve the right to resume the use of the water. Laws of 1841, page 174."

And "The stipulation that the right to use the water for the mill should be perpetual did not and could not affect the right of abandonment."

"A creation of water power was no part of the conception to construct canals. It was only an incident. No licensee with his stipulation for the perpetual use of the waters of the canals to run a grist mill, can compel the State to keep up the canal for his benefit after all commercial reasons for its existence and maintenance have ceased to exist. One man, or several hundred men, cannot turn back the hand on the dial of time."

The Board of Public Works had, in fact, no power to contract with Wright's predecessor to forever maintain a dam. It cannot be found in any statute. This contract, therefore, created no obligation on the State.

It follows, therefore, that the lease by the State of Ohio to Mr. Wright's predecessor, of surplus water from the canal to be used for water power, is not a contract that can be enforced against the State, but is a mere incident to the conduct of the canals and must terminate whenever the State sees fit to abandon the canals, and that therefore the abandonment of the canals by the State does not impair the obligation of any contract the benefit of which moves to Mr. Wright.

We think it is further clear and manifest upon the record, that whatever agreement was made between the United States and the State of Ohio as to the maintenance of the canals and use thereof for the purpose of the United States Government is a matter entirely between the two contracting parties and creates no right in favor of any private individual to insist upon anything that might flow from said agreement, and that when the parties are satisfied to abandon the use of the canals (and of this there can be no question) there does not exist in any citizen any right to insist that the State shall longer maintain the canals and to predicate this insistence upon the rights of the United States Government. Hence, there is no impairment of contract under this phase of the cases.

The contention that the Canal Commissioners agreed to forever maintain a dam across the Hocking River for the uses of the canal and the mill of Mr. Wright, and that to abandon the canal would impair the contract in that behalf, is not well taken. There is nothing in the petition which

shows that the State will not perform any duty resting upon it as to the maintenance of the dam. The abandonment of the canal is not a declaration that the dam will not be maintained, if in fact it should be maintained by the State. There is no allegation of the petition that the State has made any threats in that regard. But, aside from all that, whether the States hould or should not maintain this mill dam, cannot hinder the State from abandoning its canal system, and transferr ing its lands to any other agency for the purposes of public uses.

A fee simple to this right of way was obtained by the State and there can therefore be no conditions attached to it, hence even though the State did not keep the dam in order, that fact could not work against the right of the State to transfer the land to which it had the title in fee. Therefore, there is in this matter no impairment of contract.

It appearing then that there is no impairment of contract in any of the matters complained of, and that neither the Constitution nor any Statute of the United States is called in question, and that the complainants have no rights under the so-called compact between the State and the United States, then it must follow that there is no federal question raised in any of these cases, and that therefore the petitions in error should be dismissed.

Respectfully submitted,

D. L. SLEEPER,

JOHN J. STODDART,

Of Counsel for Defendants in Error.

Nos. 316, 317 and 318.

SUPREME COURT OF THE UNITED STATES.

Brf. of Sleeper v. Grosvenor & Stoddart for D.

Filed May 12, 1899.

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JOHN J. WALSH,

vs.

THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

ROBERT WRIGHT,

vs. No. 317.

THE SAME.

MICHAEL S. VOUGHT,

vs. No. 318.

THE SAME.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANTS IN ERROR.

D. L. SLEEPER,
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Counsel for Defendant in Error.

COLUMBUS:
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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR DEFENDANTS IN ERROR.

I.

We shall discuss briefly the proposition for which counsel for plaintiff in error contends, the discussion to apply to all the causes and then pass to a consideration of the special features of the Wright case, touching generally upon the questions involved in the other causes.

The proposition upon which learned counsel for plaintiff in error bases his argument is that the furnishing of funds to the State by the National Government

for use in building canals, and the proviso that "said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same," constitutes a contract whereby the State is compelled to maintain the canals until an agreement to abandon them is entered into by the two governments, and that therefore (because a citizen), the plaintiff in error has a right to demand that the canals be so maintained for his sole interest until the two governments solemnly dissolve the original agreement. We have re-stated counsel's proposition so that its true import may be more apparent.

The conclusion of counsel is a *non-sequitur* and does not follow from the premises. Only a party or privy to a contract can object to a breach by another party. Contracts are made only for the benefit of the persons within their terms. The only parties to this arrangement between the two governments are the United States Government and the State Government. They alone are interested in it. They alone can be heard to complain. If the United States Government does not object to the abandonment of the canals, but tacitly consents, then no one else can be heard. The plaintiff in error does not complain as an official of the National Government, nor on its behalf, nor that the alleged contract was made on his behalf, his petition shows that he is absolutely unknown in the arrangement between the parties, a volunteer without standing and nowhere within the scope or objects of the

alleged contract, he does not represent a party to it, hence is a stranger to the matters between the Governments, and it must follow that he has no right to complain, whatever the parties to the alleged contract may do as to the subject matter of their agreement, and it must further follow that the plaintiff in error has no basis for his claim that the State must maintain the canal for his private benefit.

The position that the sovereignties acted in this case as agents for the plaintiffs in error (p. 10 of plaintiff's brief), cannot apply in these cases.

The plaintiff does not claim that he is wronged by being deprived of the use of the canal as a public waterway over which to transport persons or merchandise, or that the abandonment injures him by reason of the fact that the canals are thus rendered useless as arteries for the transmission of property and persons, the only claim is that plaintiff in error loses the privilege of using water from the canal to run his mill. The negotiations between the two sovereignties dealt with the matter of providing canals for public use and for this solely. Not a word or syllable is found in the acts and resolutions of the two sovereignties or in the aforesaid proviso looking to securing, or providing for, any rights to any person whomsoever to have or gain private rights or privileges through the matters then dealt with. The whole negotiation dealt with matters entirely public utilities to which private parties had no relation, and not one provision of which secured to them a single right upon which to rely. The fact that a person had land along the canal gave him no right not common to every citizen of the State. He could

legally acquire no right superior to those of citizens miles away. All were equally interested as part of the general public, but no one more than another. The fortuitous benefit of being along the canal was one solely of location and accident, carrying with it no right whatever. It did not affect in the slightest degree the canal or the relative position of the two Governments in reference thereto, nor the fact that it was constructed for the benefit of the general public, not for the abutting land holders. The abutting owners did not secure a single right that is not common to all the citizens of Ohio. If each and every citizen of Ohio can enjoin the State from abandoning the canal for canal purposes, then plaintiff can. If not, then plaintiff cannot. His rights are measured by the same rule as theirs. No one would claim that the consent of every citizen is needed to authorize the State to cease using the canals as waterways until the two Governments have formally revoked their arrangements.

We submit that plaintiff's rights are only such as are common to all citizens of Ohio, that the general public has no interest in the continuance of the canals to furnish water power for owners of land abutting on the canals, and therefore the plaintiff has no vested right growing out of the alleged contract between the sovereignties.

Whatever may have been the contention of parties as to the grade or quality of title the State could convey to the defendant for that part of this canal included in the piece built by the Lancaster Lateral Canal Company and sold to the State, that contention was

settled and the rights of parties thereto finally adjudicated in the State Courts. The title to the easement was there confirmed in the defendant railroad company subject to payment by it to the owners in final reversion for the damage of all additional servitude thereby laid upon the land. The ownership of the easement passed from the State to the company. If the company thereby acquired a title that called for an additional expense, it alone can complain.

The matter lies between the State and its lessee for adjustment. Whatever the State had it conveyed. The Supreme Court of the State has defined the rights of the parties in that regard, has determined that defendant owns the easement for the use of its railroad and must pay whatever damage arises from the change of use. This is not a federal question and hence does not present a question for review in this Court.

II.

Passing from the consideration of brief of counsel for plaintiff in error to a further discussion of the principles involved in the cause, we note that:

The single question presented by the record is whether the statute passed by the Legislature of Ohio, May 18, 1894, (91 O. L., page 327), impairs the obligation of any contract to which the plaintiff in error is a party or a privy.

Upon the facts stated in the petition, such impairment of the obligation of contract could only arise in two ways:

First—If the donation of land by the National Government to the State Government for the purpose of

building canals, and its acceptance by the State amounted to a contract, and some obligation of that contract has been impaired by said Act of the Legislature, which impairment affects the right of the plaintiff in error involved in the subject matter of the contract.

Second—If said Act of the Legislature of Ohio impaired any prior Act conferring contract rights upon the plaintiff in error or his predecessors in title, by reason of the alleged contract of the State to maintain forever said mill dam over the Hocking River so as to afford sufficient supply of water for said grist mill.

FIRST.

Does the donation of land by the National Government to the State Government for the purpose of building canals, and its acceptance by the State amount to a contract, and has some obligation of that contract been impaired by said Act of the Legislature, which impairment affects the right of the plaintiff in error involved in the subject matter of the contract.

The record discloses that on the 24th day of May, 1828, the Congress of the United States passed an Act granting a quantity of land to the State of Ohio to aid in the construction of canals.

The 5th section is as follows: "Section 5. And be it further enacted that there be and hereby is granted to the State of Ohio 500,000 acres of land owned by the United States, within the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or may hereafter be, contracted by

said State in the construction of the canals within the same, undertaken under the authority of the laws of the said State now in force, or that may hereafter be enacted, for the extension of canals now making; which land when selected shall be disposed of by the Legislature of Ohio for that purpose, and no other;

"Provided, the said canals when completed OR USED, shall be and forever remain, public highways, for the use of the Government of the United States, free from any toll or charge whatever for any property of the United States, or persons in their service, passing along the same;

"And provided, further, that said canals already commenced shall be completed in seven years from the approval of this Act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales shall not be affected by that failure."

It is further provided by the 7th section of said Act, that, "Said Act shall take effect provided the Legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the State to the several provisions and conditions thereof; and unless such expression of assent be made, this Act shall be wholly inoperative."

U. S. Laws, 1st session, 20th Congress, p. 113.

On the 22d day of December, 1828, the Legislature of Ohio assented to the several provisions and conditions of said Act.

It will be noted that this provision of Congress does not cast upon the State of Ohio the duty or burden to forever maintain said canals. Nothing whatever is said as to the length of time the State shall maintain

them. The only right reserved by the National Government is that when the canals have been completed and ARE USED, they shall remain public highways for the use of the United States, free from toll or charge for property or persons in the service of the United States along the same. The State of Ohio has complied with this proviso and has kept them at the service of the United States Government during all the time that they have been in use. At that time canals were the best known methods of transporting persons and property. Since then the demands of business have been met by the ingenuity of the people, and along all the small and interior lines of canals the railway has taken the place of water-way, the vestibule train supplants the canal packet-boat, and the fast freight train conveys the freight once entrusted to the slow-going canal boat. This class of canals has passed into history. They do not belong to the present day. The United States Government would not consider for one moment the propriety of transporting its mails or its troops or supplies along such canals, where the same are paralled by railroads. There can never be a demand by the United States Government for any rights saved to it by the above mentioned proviso. The objects for which the canal water-way was constructed have been long since attained. The canals have done the duty for which they were created and they can no longer perform that duty as it is required to be performed in the present day. The object of their creation has been satisfied, and with that has gone the satisfaction of all the duties and obligations resting upon the State and in favor of the United

States, saved to the United States by means of the said proviso. There now remains no duty of the State in that regard, and no right which the United States claims. Both parties to the original contract, if it was a contract, are satisfied, and every term and provision and obligation of the grant and its acceptance has ceased to be operative.

To longer maintain the canals would be no benefit to the United States Government. That Government would not use them. These conditions could not have been foreseen in 1828 when the National Government lent its aid in their construction. The Sovereignties could not have foreseen that railways would supplant canals. Such conditions could not have been in the contemplation of the parties, and the State will not be held by the general words of the Act of Congress donating the aid.

Chicago, etc., Ry. Co. v. *Hoyt*, 149 U. S., 1–14.

The State of Ohio has for years been changing the use of its rights of way from water ways to railways, and the United States Government has not objected.

REVOCATION OF ALLEGED CONTRACT BETWEEN STATE AND NATION.

A review of the history of the Acts of abandonment of the various portions of the canal system of Ohio clearly demonstrates this proposition.

On March 24, 1863, the Legislature passed an Act abandoning the southern portion of the Miami and Erie Canal, now known as Eggleston Avenue, and granting the same to the City of Cincinnati for street purposes. This Act was sustained by the Supreme Court of Ohio in the case of *Fox* v. *Cincinnati*, 33 O. S., 492, which case was carried to the Supreme

Court of the United States, and the decision of the Supreme Court of the State was sustained by the decision of this Court as reported in 104 U. S., 783.

Again in *Elevator Co.* v. *Cincinnati*, 30 O. S., 629, the Supreme Court of the State sustained the validity of said Act of abandonment.

On March 26, 1864, the Legislature of the State passed an Act abandoning the northern end of the Miami and Erie Canal, and granting the same to the City of Toledo for highway purposes. This Act was reviewed and sustained by the Supreme Court of Ohio in the cases of—

Hubbard v. *Toledo*, 21 O. S., 379.
Malone v. *Toledo*, 28 O. S., 643.
Richards v. *Toledo*, 31 O. S., 506.

On April 13, 1868, the Legislature passed an Act abandoning the Walhonding Canal and authorizing its sale, and the same has been since sold and transferred to a railroad company for railroad purposes.

On January 31, 1871, an Act was passed supplemental to the Act of March 26, 1864, relating to the abandonment of the northern end of the Miami and Erie Canal.

On April 29, 1872, an Act was passed abandoning the northern end of the Ohio Canal and authorizing the City of Cleveland to occupy the same, and the same is now occupied by a railroad company.

On March 6, 1873, an Act was passed abandoning the southern end of the Hocking Canal, and authorizing its use for public purposes.

On April 11, 1876, an Act was passed abandoning a further portion of the Hocking Canal south of the village of Chauncey, a portion of which is now occupied

by The Columbus, Hocking Valley & Toledo Railroad Company.

On April 11, 1876, an Act was passed vacating a portion of the Ohio Canal.

On May 4, 1877, an act was passed abandoning another portion of the Hocking Canal below the village of Nelsonville.

On April 12, 1888, an Act was passed abandoning a portion of the Wabash and Erie Canal, and authorizing the sale of the same.

On March 3, 1891, an Act was passed abandoning the Wabash and Erie Canal in Paulding County, and transferring the same to the Commissioners of said County for road, ditch and public purposes.

All of these eleven Acts of abandonment remain in full force and effect, and in so far as the Courts of the State have been called upon to pass upon them, they have been universally sustained and the power of the Legislature to abandon any portion of her canal system has been universally upheld.

These Acts of abandonment cover a third of a century. In all that time no officer of the National Government has seen fit to question the authority of the State, or to oppose any of these Acts. In one instance the Supreme Court of the United States has upheld the authority of the Legislature to abandon her canals.

If the National Government had any rights under said alleged compact or agreement, it will be held to have waived such rights and abandoned said compact by acquiescence and silence.

All the rights reserved to the United States have become so manifestly valueless that there is no reason or cause for the United States Government to object to the change of use above indicated, but on the other

hand, there is every reason for the Government to encourage the building of railroads to take the place of the antiquated methods of transportation formerly furnished by the canals. Such change from water-way to railway is for the best interests of the nation. Since the parties to this arrangement are satisfied, and the United States is not objecting to this change of use, then no other persons can object.

Using the language of Mr. Justice MILLER in *Grinnell* v. *Railroad*, 103 U. S., 744: "These plaintiffs had no right to stir up a litigation which the parties interested did not desire to be started."

"A third party cannot take upon himself to enforce conditions attached to the grant when the Government does not complain of their breach." *Van Wyck* v. *Knevals*, 106 U. S., 369.

No right was saved by the proviso to any other person or power excepting to the United States. It is not saved for the benefit of the public, and especially there is nothing saved or reserved or declared for the benefit of private individuals. No other persons are privies to this arrangement except the United States and the State of Ohio.

When they are satisfied, it does not lie with any person to complain. Neither of the parties to the arrangement are complaining. The complaint here comes from one who complains because the parties to the contract are satisfied, and his complaint is not for their benefit, but solely for his own private benefit. No right is conferred upon the plaintiff or his predecessors in title to presume that the State would forever maintain the canals. If the plaintiff based his contract for water power or the maintenance of the mill dam upon the presumption of the probability that the

National Government would always insist upon the canals being maintained, such presumption was no part of the contract or arrangement between the State and the National Government, and the failure of plaintiff to realize on his presumption throws no duty upon the State.

We therefore respectfully submit that if the donation and acceptance by the State of the said lands for canal purposes cast upon the State of Ohio any duty as to the use of these canals, it was solely in favor of the United States Government and not in favor of any person, and that therefore the plaintiff in error had no rights thereunder, and therefore the record does not show that he has any cause for complaint by reason of the change of use of said canal right of way, based on the arrangement between the United States and the State of Ohio.

SECOND.

Does said Act of the Legislature of Ohio impair any prior Act conferring contract rights upon the plaintiff in error or his predecessors in title, by reason of the alleged contract of the State to maintain forever said mill dam over the Hocking River so as to afford sufficient supply of water for said grist mill.

I.

The only provision as to quantity or kind of title to be acquired through the statute under which the State acquired title to the land granted by Mr. Wright's predecessors in title, provided: "That the Canal Commissioners shall pay the damages so to be assessed and appraised, and the *fee simple* of the premises so appropriated *shall be vested in this State.*"

23 O. L., Page 57-58.

Ohio ex rel. v. *Railroad Co.*, 53 O. S., 139.

The State of Ohio v. *Snook*, 53 O. S., 521.

This statute provided for a full fee simple title and no lesser title could be or was acquired. The title could not be conditioned upon the maintenance of a dam nor a supply of water through the canal. It could not be a conditional title. The petition does not allege that it was a conditional title, and if it did so allege, it could have no effect, because no other than a fee simple title could have been taken. The statute under which the title was acquired did not authorize the agents of the State to take any conditional title, and any agreement outside of their authority, such as providing to forever maintain a dam, or to forever furnish water to run a mill, was *ultra vires* beyond their authority and absolutely void, therefore, no contract between the State and the mill owner to forever maintain a dam or canal ever existed.

The record discloses that Mr. Wright's mill was built and in operation before the canal was constructed (page 10); that it was on the bank of the Hocking River and received its water supply from the Hocking River (page 10); that the Hocking Canal entered the river some distance above the mill and used the river almost down to the said mill, and from that point down past the mill, the canal as constructed took its water from the river. The mill is situated between the canal and river (page 10). Thls shows that the mill was not cut off from the waters of the Hocking River, and that its use of those waters is in no way obstructed or impeded by the non-user of the canal for canal purposes, and the only result would be to leave all of the waters of the river for the use of the mill whereas when the canal was in operation, part of the waters of

the river were used for canal purposes. This canuot be an injury to Mr. Wright and cannot in any way hinder him from using the waters of the river. The record shows that he used both the waters of the river and the canal during the time the canal was in operation. (Page 10.) Hence he is not deprived of any water right which he originally had before the making of the canal, but on the other hand is restored to the full possession of all the water rights that he ever had, and in that regard, is placed in the same position that he was before the canal was built, hence no contract right as to water supply can possibly be impaired for this reason.

Mr. Wright nowhere alleges that the agents of the State agreed that water should be forever taken from the canal to run the mill. If, however, such agreement had been made it would not be binding upon the State, because such agreement would likewise have been beyond the power of the State's agents and not the kind of compensation authorized by the statute above quoted to be paid by the Canal Commissioners.

The Canal Commissioners were, by the said statute, only authorized to pay the damages so to be assessed. There was no authority to bind the State by a payment in the nature of a perpetual or other promise to maintain a dam. They could not pay such a consideration. No such damage was authorized by the Act to be assessed against the State. Damages were not so measured nor paid. The only payment authorized was a money payment such as would forever discharge the obligation of the State. None other would be legal or binding on the State, and the promise, if ever made by

the Canal Commissioners, must fall for want of authority or power in them to make it.

It follows, therefore, that if Mr. Wright's predecessor ever had any right to use the waters of the canal, he must have obtained the same through the statutes authorizing the Commissioners or Board of Public Works to lease the surplus waters of the canals.

They are as follows :

"Whenever in the opinion of the Board of Public Works, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the State, over and above the quantity of water which may be required for the purpose of navigation, the said Commissioners may order such surplus water, and the lands granted to, or purchased by the State, for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rent, or otherwise ; as they may deem most beneficial for the interest of the State."

Bates Revised Statutes, Sec. 218–87.

"No hydraulic power, nor right to the use of any water, shall be sold, leased or conveyed, except such as shall accrue from the surplus water of the canal, feeders, or dams, or from the water passing around any lock, after supplying the full quantity necessary for the purpose of navigation."

Bates Revised Statutes, 218–88.

"Every lease, grant or conveyance of water power, shall contain a reservation and condition, that the State, or its authorized agents, may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with, and injuriously affect the navigation of either of the canals, feeders, or streams from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded or remitted to the purchaser or lessee, his heirs or assigns."

Revised Statutes, 218–89.

Construing these sections, the Supreme Court of Ohio declared:

"The right of surplus water and to lease the same for private uses, is an incident of the public use of the canal for purposes of navigation. The canals of the State were authorized, constructed and maintained for public purposes, and not to afford water power, to be leased or sold, for private uses. The latter use is subordinate and the right to the same may be terminated whenever the State, in the exercise of its discretion, abandons or relinquishes the public use."

Elevator Co. v. *Cincinnati*, 30 O. S., 630.

"The abandonment of her public canals by the State creates no liability on her part to respond in damages resulting therefrom to parties holding leases of 'snrplus water,' under the Act of March 23d, 1840, to 'provide

for the protection of the canals of the State of Ohio, regulation of the navigation thereof and the collection of tolls.'"

Hubbard v. *City of Toledo*, 21 O. S., 379, Syl.
Cooper v. *Williams*, 4 O., 253.
Buckingham v. *Smith*, 10 O., 288, 297.
Hubbard v. *City of Toledo*, 21 O. S., 399.
Elevator Co. v. *Cincinnati*, 30 O. S., 630, 646, affirmed in 104 U. S., 783.
Fox v. *Cincinnati*, 33 O. S., 492.
State ex rel., v. *Board of Public Works*, 42 O. S., 615.
Halderman v. *Pa. R. R. Co.*, 50 Pa. St., 440, 441.

"1. Under the provisions of the act of March 23, 1840; (3 Rev. Stat. 417, Sec. 20 to 23 inclusive) relating to the canals of the State, it is the duty as well as the right, of the Board of Public Works, to resume the privilege or right to the use of surplus water, leased or sold for hydraulic purposes, or any portion thereof, whenever, at any time, it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of the canal, feeder or stream from which such water is taken."

"2. The Board of Public Works is not authorized by said statute to in any manner surrender, abridge, restrict or limit its power to resume, at any time, the surplus water leased or sold for hydraulic purposes, whenever it may be deemed necessary for the purposes of navigation; nor to create or impose any burden or obligation upon the State, by reason of the exercise of such right of resumption, other than is authorized by the 23d section of said act."

"3. Hence, a clause providing that on such resumption of surplus water and termination of the lease, the

Board of Public Works shall pay to the lessee the value of the lasting improvements erected for the use of such water, is a restriction on the performance of a public duty, and is unauthorized and void."

State ex rel. Fanger v. *Board Public Works*, Syl. 42 O. S., page 607.

"3d. But if we are in error in this construction of the statute and these words embrace conditions and reservations imposed upon the State, they must be such as relate to the use of the water for hydraulic purposes, which are in the nature of the quantity used, the manner of its use, &c. It is quite clear they are not broad enough to embrace the conditions to be imposed upon the State after the right to use the water has expired, or after the State has abandoned the canal as a public highway. By such resumption or abandonment, which are identical in their results, so far as lessees are concerned (*Hubbard* v. *Toledo*, 21 Ohio St., 379) the State is not liable to respond in damages to the lessee. If it were otherwise the State would be compelled to maintain her canals at any sacrifice for the exclusive benefit of the lessees of surplus water, or become the purchaser of the property of the lessee, thus making the incidental purpose, paramount to the public use."

State ex rel. v. *Board Public Works*, 42 O. S., 615.

The Supreme Court of the United States in construing this statute in a matter brought before it where a party became the owner of a lease made pursuant to the provision in this section, and a statute was subsequently passed whereby the canal within certain limits was granted to and appropriated by a city for a highway, held "that the leesee was not thereby deprived of his property without due process of law, as the State, so far from assuming an obligation to maintain

the canals to supply water power, had the right, of which every lessee was bound to take notice, to discontinue them whenever the Legislature deemed expedient."

Fox v. *Cincinnati*, 104 U. S. Supreme Court, 783.

From this we are justified in claiming that Mr. Wright's predecessor could not, under the statutes of the State, acquire any right to demand water to be furnished him from the canal after the State had determined to cease the use of the canal and could not insist that the State should keep up the canal for his own private use, and that he used the surplus water with the knowledge that the State had the right to discontinue the supply whenever the Legislature deemed it expedient to do so.

No other statute of the State authorized any agent of the State to make any contract with parties along the canal to bind the State in any other manner than as fixed by the statute above quoted.

The statute authorizing the construction of this canal authorized the Canal Commissioners to "take possession of and use all and singular any lands, water, streams and material necessary for the prosecution of the improvements intended by this Act, to make all such canals, dams and other works and devices as they may think proper for making said improvements; doing, nevertheless, no unnecessary damage," and further enacted that, "provided, however, that all such applications to the Board of Canal Commissioners for compensation for any lands, waters, streams and materials so appropriated shall be made within one

year after such lands, waters, streams or materials shall have been taken possession of by said Commissioners for the purposes aforesaid."

23 O. L., page 57, 58.

The statute fixes the limit of powers granted to the Canal Commissioners as contracts about the consideration of the lands and streams taken by the State for canal purposes. It clearly gives to the Commissioners no right to bind the State by a contract to furnish water forever through the canal to this mill, nor does it empower them to bind the State by contract to forever maintain a mill dam. The compensation to be claimed and paid must be claimed within a year from the time of the appropriation, and it is clear from the wording of the Act that such compensation must have been a full and final compensation to be paid or given at the time and not a continuing liability on the State.

We therefore arrive at the conclusion that there was no authority vested in the Canal Commissioners to bind the State to forever maintain this canal for the purpose of furnishing water to the mill of Mr. Wright, nor to bind the State to forever maintain a dam across the Hocking River for the purpose of furnishing water to his mill.

The title to this land passed from Mr. Wright's predecessor to the State in fee simple. It could pass in no other way. Nothing that the State might do with this strip of land over which the canal was constructed and which has been leased to the defendant railroad company, could in any way affect any right

of the plaintiff in error or impair any contract which he has with the State of Ohio. If he has any contract rights with reference to the mill dam, those rights are not connected with the title to this real estate. The State has a right to sell or dispose of the land in any manner it chooses, and such sale or disposition touches upon no right of the plaintiff in error. If the State is under any obligation to maintain this mill dam, the petition does not show that the State has refused to maintain it. For anything that the petition shows, the mill dam is in the best of repair and is fully up to anything that could be claimed under the alleged contract, and the right of the plaintiff in error, if he ever had any, to look to the State to maintain this mill dam hereafter, during all future time, is in no way infringed upon or impaired or interfered with by the lease of title to the land. The State still owns the fee title to this land, subject to the lease to this railroad company, with right of reversion to the State, but Mr. Wright could not have sold this land nor have taken away the possession thereof from the State in order to compel the State to maintain the dam or furnish water through the canal under the alleged contract. There is no connection of any kind between whatever rights the plaintiff in error could have as to the maintenance of the dam and the water supply, and the title to this property, and the statute under which it was acquired would permit no such relation or connection, but would only permit the full and ample fee title to pass to the State. This the State has just as full a right to lease to the defendant in error.

The natural deduction from the foregoing reasoning is that the lease of the lands does not impair any contract which Mr. Wright has with the State of Ohio, and therefore the Act is not repugnant to Section 10, Article 1, of the Constitution of the United States.

II.

Judge DANIELS, in *Butler* v. *Pennsylvania*, draws a clean cut distinction between contracts pertaining to public utilities and those dealing with private matters. We quote from his opinion because of its forcible statement:

"The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed private rights of property are vested. These are clearly distinguishable from measures of engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is a matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to re-appoint them, after the measures which brought them into being shall have been found unless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the

perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult if not impracticable, in this view, either to remodel the organic law of a State, as constitutional ordinances must be of higher authority and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensible for the preservation of the body politic, and for the safety of the individuals of the community. It is true, that this power, or the extent of its exercise, may be controlled by the higher organic law or constitution of the State, as is the case in some instances in the State constitutions, and as is exemplified in the provision of the Federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. The Constitution of Pennsylvania contains no limit upon the discretion of the Legislature, either in the augmentation or diminution of salaries, with the exceptions of those of the Governor, the Judges of the Supreme Court, and the Presidents of the several Courts of Common Pleas.

The salaries of these officers cannot, under that Constitution, be diminished during their continuance in office. Those of all other officers in the State are dependent upon legislative discretion. We have already shown, that the appointment to and the tenure of an office created for the puclic use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term contracts, or, in other words, the vested private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them. This doctrine is in strictest accordance with the rulings of this Court in many instances, from amongst which may be cited its reasoning in the important and leading case of the *Charles River Bridge* v. *The Warren Bridge*, in 11 Peters Reports, and in the case of *The State of Maryland* v. *The Baltimore & Ohio Railroad Company*, in 3 Howard's Reports, to which might be added other decisions upon claims to monopoly, as ferry privileges, in restraint of legislative action for public improvement and accommodation. In illustration of the doctrine here laid down, may also be cited the very elaborate opinion of the Supreme Court of New York in the case of *The People* v. *Morris*, reported in 13 Wendell, 325."

The case at bar is analagous to the above case. There never was any contract between the plaintiff in error on the one hand, and the National and State Governments on the other or on his behalf whereby

"perfect rights, certain definite, fixed, private rights of property are vested" in him. He never was a party to the arrangement between the United States and the State. He had no standing in the matter. The whole subject matter pertained to the public business of the State and not to private benefit. The measures and engagements undertaken by the State in constructing the Hocking Canal were for the benefit of all and were not undertaken with a view of carrying them on after they ceased to be of public utility, that is, after the object of their creation and reason for their existence had ceased. When the public utility of this canal ceased, it ceased to effectuate a public use. "The measures which brought it into being" have been found useless, have been fulfilled. The plaintiff cannot insist upon a perpetuation of a public policy and expense which is useless and can serve no purpose except to the private accommodation of himself alone. It is a notorious fact that the interior canal systems of Ohio and other States have been supplanted and, in large part, made over into railways, with the full approval and tacit consent of the United States Government. Their use has been abandoned by the only parties who are interested in the agreements accompanying their construction. No one else was a party to the arangement. No one else can hinder the parties from abandoning their own contract, and no one's contract rights are thereby impaired.

The principles governing the cases where a State may bind itself by its legislation were first clearly enunciated in the Dartmouth College case. Speaking of

that case, Justice SWAYNE in *Newton* v. *Commissioners*, 100 U. S., 557, said :

"The principle there laid down, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a *public* law relating to a *public subject* within the domain of the *general* legislative power of the State, and involving the *public rights* and *public welfare* of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the Court by the argument in the Dartmouth College case."

In the case of *East Hartford* v. *The Hartford Bridge Co.*, 10 How. 533, the Court said :

" But it is not found necessary for us to decide finally on this first and more doubtful question, as our opinion is clearly in favor of the defendant in error on the other question ; namely, that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject matter of their action, we think that the doings of the Legislature as to this ferry must be considered rather as *public laws* than as contracts. They related to *public interests. They changed as those interests demanded.* The grantees likewise, the towns, being mere organizations for public purposes, were liable to have their public powers, rights and duties modified or abolished at any moment by the Legislature." . . .

"It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies."

So in the case at bar, the legislature of Ohio was acting on the one part and the United States on the other. They were acting in relation to a *public object*, namely, a waterway for the transportation of the person and property of the general public. The *subject matter* of the negotiations between the United States Government and the State of Ohio pertained to *public duties* and not to private contract and are subject to abandonment at the will of the parties to the arrangement without consideration of the inconvenience to private individuals who may have acted upon the presumption that the public use would be perpetually maintained. In dealing with such public matters, a State cannot be bound to make a change in its conduct, nor can it be held to continue and maintain an expensive canal system which has become entirely useless as a public utility, simply because it established and constructed the canals and a private individual had a license to use the surplus water therefrom. As said by the Court in 10 Howard 533:

"It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, as well as supervision over its subordinate public bodies."

The case at bar falls easily within the cases classed in *Newton* v. *Commissioners*, 100 U. S. 559, as dealing

with "governmental subjects" and hence within the category of those cases lying outside of the inhibition of the National Constitution.

III.

In the case of *Armstrong* v. *The Commissioners*, 4 Blackf. (Ind.), 216–217, the statute considered by the Court declared that "so soon as the public buildings shall be completed in the manner aforesaid at the place designated, the same shall be *forever* thereafter the permanent seat of Justice of said County of Dearborn." Private parties had agreed to build the Court House as a condition precedent. They performed the condition. The Court held that "the act did not create a contract." This ruling was approved in *Newton* v. *Commissioners*, (100 U. S., 560).

Bentham says that "All laws may be said to be framed with a view to perpetuity, but perpetual is not synonymous to irrevocable; and the principle on which all laws ought to be, and the greater part of them have been established is, that of defeasible perpetuity—a perpetuity defeasible by an alteration of the circumstances and reasons on which law is founded." As quoted in 24 Howard, 263, 302.

What contract right has or could vest in the plaintiff in error from the agreement between the National and State Government growing out of the donation of the lands to the State by the United States with the proviso for use of the canal by the latter and the acceptance thereof by the State? No right of his, distinct from that of all other citizens was safeguarded thereby. The canal was built for the public at public expense.

The National Government contributed part of the cost for the privilege of using them for transportation—still a public use.

These were the sole provisions. Not a word, not a provision additional. No right reserved for plaintiff in error or any other person. Where is his contract right vesting through this transaction? He has none. What consideration did he give? It is not claimed that he in any way had anything to do with the negotiations or agreement between the two Governments, hence he was not a party thereto, and acquired no rights thereby. No contract exists in his favor.

This Court has said: "But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized and never permitted to extend *either in scope or duration* beyond what the terms of the concession clearly require."

Tucker v. *Ferguson*, 22 Wall., 575.

"It must not be a mere gratuity. There must be a sufficient consideration, or, no matter how long the alleged right has been enjoyed, it may be resumed by the State at its pleasure."

Newton v. *Commissioners*, 100 U. S., 561.
Citing *Christ Church* v. *Philadelphia*, 24 How., 300.

"Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

Fertilizing Co. v. *Hyde Park*, 97 U. S., 666.

In the case at bar, no affirmation is made that the plaintiff in error paid any consideration in the agreement between the two Governments or was a party thereto, or had any part therein. The record is in absolute negation of such position, and hence no right vested in him thereby, and the parties are entitled to abandon the subject matter thereof at their pleasure.

Following from the foregoing, we submit that:

(*a.*) **The title to the strip of land acquired by the State of Ohio from Mr. Wright's predecessor was acquired by fee simple title free from all incumbrances or rights whatever.**

(*b.*) **No contract could have been made by the agents of the State of Ohio binding the State to maintain a mill dam or to furnish water to the mill by way of the canal.**

(*c.*) **Plaintiff in error was not a party or privy to the agreement between the United States and the State of Ohio, and acquired no rights thereunder.**

(*d.*) **If he has any rights they sound in damages, and the Act leasing the canal lands saves them to him by express stipulation.**

(*e.*) **No contract right of plaintiff is impaired, and hence he does not bring his case within the inhibition of the Constitution of the United States.**

(*f.*) **No contract right of any of plaintiffs in error is impaired, and hence none of these causes come within the operation of the Constitution of the United States.**

Respectfully submitted,

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WALSH *v.* COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 90. Submitted December 13, 1899. — Decided February 26, 1900.

By an act of Congress passed in 1828, a large quantity of land was granted to the State of Ohio for the construction of canals. The act provided that such canals, "when completed or used, shall be, and forever remain, public highways, for the use of the Government of the United States." The grant was accepted by the State; but in 1894, the state legislature authorized the abandonment of certain canals, which had been constructed under the act of Congress, and the leasing of the same to a railroad company.

Held, that there was reason to claim that the act of 1894 impaired the obligation of the previous contract between the State and the Federal Government, and that a Federal question was thereby raised.

Held, further, that in accepting the Congressional land grant of 1828, there was no undertaking on the part of the State to maintain the canals as such in perpetuity, and that the Government was only entitled to their free use as long as they were kept up as public highways, and that the act of the legislature of Ohio, authorizing their abandonment as canals and leasing them to a railway company, did no violence to the contract clause of the Constitution.

Held further, that a private property owner was no party to the contract between the State and the Federal Government, and stood in no position to take advantage of a default of the State in respect to its contract. His rights were entirely subsidiary to those of the Government, and if the latter chose to acquiesce in the abandonment of the canals, he had no right to complain.

THIS was a petition filed in the Court of Common Pleas of Franklin County, Ohio, by the plaintiff Walsh, to enjoin the defendant railroad company from entering upon the property of the Lancaster Lateral Canal Company, and upon plaintiff's premises, and from constructing a railroad thereon, and for

a decree declaring a certain act of the General Assembly of Ohio giving it permission to do so to be null and void.

The case was determined upon demurrer to the petition, which set forth, substantially, the following facts: On February 4, 1825, the General Assembly of the State passed "an act to provide for the internal improvement of the State of Ohio, by navigable canals," 23 Ohio Stat. 50, among which was the Ohio Canal, extending from the mouth of the Scioto River through the State of Ohio to Lake Erie, and passing through the village of Carroll in the county of Fairfield. On February 8, 1826, the Lancaster Lateral Canal Company was incorporated by act of the General Assembly, 24 Ohio Laws, 71, and authorized to construct and operate a canal "from the town of Lancaster to such point of the Ohio Canal as shall be found most eligible." The village of Carroll was fixed upon as the terminus.

On May 24, 1828, Congress passed an act to aid the State of Ohio in the construction of its canals, 4 Stat. 305, by the fifth section of which act (printed in full in the margin)[1] Congress granted to the State 500,000 acres of land in that State for this purpose, with a proviso that "the said canals, when completed or used, shall be, and forever remain, public high-

[1] SEC. 5. And be it further enacted, That there be, and hereby is, granted to the State of Ohio five hundred thousand acres of the lands owned by the United States, within the said State, to be selected as hereinafter directed, for the purpose of aiding the State of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, contracted by said State in the construction of the canals within the same, undertaken under the authority of the laws of said State, now in force, or that may hereafter be enacted, for the extensions of canals now making; which land, when selected, shall be disposed of by the legislature of Ohio, for that purpose, and no other: *Provided*, The said canals, when completed or used, shall be, and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same: *And provided further*, That the said canals, already commenced, shall be completed in seven years from the approval of this act, otherwise the State of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the State by such sales shall not be affected by that failure.

ways, for the use of the Government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same." The seventh section of the act declared that "this act shall take effect, *provided*, the legislature of Ohio, at the first session thereof, hereafter to commence, shall express the assent of the State to the several provisions and conditions hereof; and unless such expression of assent shall be made, this act shall be wholly inoperative."

Pursuant to this act, the General Assembly of the State of Ohio on December 22, 1828, passed an act expressly declaring the assent of the State to the provisions and conditions of the act of Congress. Under these acts the State received and took possession of the 500,000 acres of land provided by the grant, and from time to time sold and disposed of the same, and received from the proceeds of such sale somewhat more than $2,200,000.

The Lancaster Lateral Canal Company, incorporated as above stated, proceeded to construct and operate its canal under its charter until December 22, 1838, when it sold and conveyed the same to the State of Ohio, under an authority conferred upon the Board of Public Works, by an act passed March 9, 1838, for the sum of $61,241, which was paid to the company out of the funds realized by the State from the sale of the Congressional land grant. The canal was subsequently, under an act of the legislature, extended from its terminus in Lancaster to the town of Athens, in Athens County, was opened as a continuous line of canal for navigation purposes prior to January 1, 1842, and this extension was also paid for by moneys realized from the sale of the land grant.

The complaint further averred that "ever since the construction of said canal, which is and has been known as the Hocking Canal, the same has been, and still is, a public highway, which has been used for the use of the State of Ohio and the Government of the United States, in pursuance of the several acts of Congress and of the General Assembly of the State of Ohio, hereinbefore set forth."

On April 12, 1894, the Columbus, Hocking Valley and

Statement of the Case.

Athens Railroad Company, defendant herein, was organized and incorporated for the purpose of building a railroad from the city of Columbus through the counties of Franklin, Fairfield, Hocking and Athens to the city of Athens, and on the 18th day of May, 1894, the General Assembly of the State passed an act for the abandonment of the Hocking Canal for canal purposes and for leasing the same to this railroad company. (91 Ohio Stat. 327.) The act is printed in full in the margin.[1] The fourth section of the act provided that the rail-

[1] An act to provide for the abandonment of the Hocking Canal for canal purposes and for leasing the same to the Columbus, Hocking Valley and Athens Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking Canal, from its junction with the Ohio Canal in the village of Carroll, Fairfield County, to its southeastern terminus in the village of Nelsonville, Athens County, be and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

SEC. 2. There is hereby granted the right, franchise and privilege of constructing, maintaining and operating over, upon and along the Hocking Canal and property of the State of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley and Athens Railroad Company, its successors and assigns, for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the treasurer of the State of Ohio on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

SEC. 3. Said instalment of fifty thousand dollars shall be paid into the state treasury before the construction of said railroad is begun, and for the remaining instalments of rental the State of Ohio shall have a first lien upon said railroad, together with its switches, side tracks, bridges and other structures erected on said property of the State of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley and Athens Railroad Company shall further execute unto the State of Ohio, to be approved by the auditor of state, secretary of state and attorney general, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars conditioned that said company will faithfully build said railroad in compliance with the condition and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the State of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond

road company should have the exclusive right during the term of the lease (ninety-nine years) "to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property holders by reason of the construction and operation of said railroad."

The plaintiff further averred that the defendant was making preparations to build its road upon the line of the canal, and was threatening to take possession of its property without having acquired the rights and interests in the said lands and tenements belonging to the plaintiff, whose lands are located on both sides of the Hocking Canal, about five miles north of the city of Lancaster, in Fairfield County, and without having purchased or acquired by condemnation or otherwise the right to enter upon said lands and to construct said railroad. That such road will constitute a permanent trespass upon plaintiff's property, and will place large addi-

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shall be executed and filed with the secretary of state within ten days after the passage of this act.

SEC. 4. In consideration of the payments aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating a railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property holders along said canal, and shall hold the State harmless from all loss or damage resulting to such property holders by reason of the construction and operation of said railroad: *Provided*, That when said railroad, its successors and assigns, cease to use said canal for railroad purposes, said canal property shall revert to the State for canal purposes.

SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this State.

SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

SEC. 7. This act shall take effect and be in force from and after its passage.

tional burdens upon his lands, which will render the same inconvenient and difficult of access; and great and irreparable injury will be done in the premises unless the defendant be restrained by an order of the court from taking possession of said canal and the said premises of plaintiff and constructing the railroad thereon.

The gist of the complaint lies in the allegation that the act of May 18, 1894, authorizing the abandonment of the canal, conflicts with that clause of the Constitution which provides that "no State shall pass any law impairing the obligation of contracts," and also with several provisions of the constitution of Ohio not necessary to be here enumerated.

A general demurrer was filed to this petition, which was sustained by the court and the petition dismissed. Plaintiff appealed the case to the Circuit Court, which also sustained the demurrer, whereupon plaintiff appealed the case to the Supreme Court of the State, which reversed the judgment of the Circuit Court, and ordered that the railroad company be enjoined from entering upon the lands of the plaintiff until it had condemned and paid for the additional burden of constructing and operating the railroad on the land according to law. 58 Ohio St. 123.

Upon motion of the plaintiff the court certified that, in the rendition of this judgment it became material to determine whether the act of May 18, 1894, was repugnant to the contract clause of the Constitution, and ordered it to be further certified that the court adjudged that it was not in violation of or repugnant to such clause, and that such act was valid and binding upon the plaintiff. Whereupon plaintiff sued out a writ of error from this court.

Mr. J. B. Foraker, *Mr. T. E. Powell* and *Mr. D. J. Ryan* for plaintiffs in error.

Mr. D. L. Sleeper, *Mr. C. H. Grosvenor* and *Mr. John J. Stoddart* for defendant in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Opinion of the Court.

1. Motion was made to dismiss the writ of error in this case for want of a Federal question. The decision of this motion was postponed to the merits, and we are now of opinion that it must be denied.

The position of the plaintiff is that, the act of Congress of May 24, 1828, granting to the State of Ohio 500,000 acres of land for the construction of canals, and providing that such canals, "when completed or used, shall be, and forever remain, public highways, for the use of the Government of the United States," and the acceptance thereof, by the General Assembly, constitute a contract by the State for the perpetual maintenance of such canals as public highways, at least until they were given up by consent of the United States, and that the subsequent act of the General Assembly of May 18, 1894, providing for the abandonment of such canals, without such consent being given, was obnoxious to that provision of the Federal Constitution declaring that no State shall pass a law impairing the obligation of contracts.

The main question then is, whether the acceptance of this act of Congress of 1828 by the General Assembly of Ohio should be interpreted as raising a contract by the State for the perpetual maintenance of these canals as public highways. We have repeatedly held that, where the plaintiff relies for his recovery upon the impairment of a contract by subsequent legislation, it is for this court to determine whether such contract existed, as well as the question whether the subsequent legislation has impaired it. *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116. This rule also applies to a contract alleged to be raised by a state statute, although the general principle is undoubted that the construction put by state courts upon their own statutes will be followed here. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *McGahey* v. *Virginia*, 135 U. S. 662; *Douglas* v. *Kentucky*, 168 U. S. 488; *McCullough* v. *Virginia*, 172 U. S. 102.

We cannot say that it is so clear that the statute in question is not open to the construction claimed that we ought to dismiss the writ as frivolous, within the meaning of the cases

which hold that, where the question is not of the validity but of the existence of an authority, and we are satisfied that there was and could have been no decision by the state court against any authority of the United States, the writ of error will be dismissed. *Millingar* v. *Hartupee*, 6 Wall. 258; *New Orleans* v. *N. O. Waterworks Co.*, 142 U. S. 79, 87; *Hamblin* v. *Western Land Co.*, 147 U. S. 531. If the statute were given the construction claimed by the plaintiff, it would be difficult to avoid the conclusion that the abandonment of the canal under the act of 1894, and its lease to the defendant railroad company, was a repudiation of the duty of the State to maintain it as a public highway; though the question would still remain whether the plaintiff would be in a position to take advantage of such default.

2. In disposing of this case the Supreme Court of the State of Ohio held (1) that the defendant railroad corporation had the power to build a railroad between the termini named, and to acquire by purchase or condemnation a right of way for its road, and other property necessary for its operation; (2) that the act of Congress of 1828, donating land to the State for the construction of canals, and the act of the General Assembly of the State accepting the same, did not constitute a contract for the perpetual maintenance of such canals; (3) that if such a contract existed, the plaintiffs in these suits were not parties to it; (4) that the Lancaster Lateral Canal Company did not acquire a fee simple in the lands, but a title for the uses and purposes of the canal, and the company could not, when the use ended, sell them to others, but the lands reverted to the owners of the freehold; (5) that by leasing the lands for the purposes of a railroad, the original easement in the lands was not extinguished, but passed to the purchaser, who took it subject to the duty of making compensation to the owner of the freehold for the additional burden imposed on the land, and such damages as might result to him from the new use.

We are concerned only with the second and third of these conclusions, which turn upon the construction to be given to the act of Congress of 1828. If, by the acceptance of this act by the General Assembly of the State of Ohio, the State

became irrevocably bound to keep up the canals for all time, for the use, not only of the Government, but of every one who incidentally profited by their preservation, it is impossible to escape the conclusion that their subsequent abandonment impaired the obligation of such contract. But we think the Supreme Court of Ohio was clearly right in its interpretation of the statute. The principal object of the act was a donation of lands to aid the State in works of internal improvement, which were then being extensively contemplated in the newer States of the West. Canals, at that time, embodied the most advanced theories upon the subject of internal transportation. Congress annexed as a condition to the grant that the canals built by its aid should "when completed or used, be and forever remain, public highways, for the use of the Government." Counsel for the defendant insists that, under the terms of the proviso, the obligation to maintain these canals as public highways existed only so long as they were "*used*" as such, and this was evidently the opinion of the Supreme Court of Ohio. Counsel for plaintiff insists, upon the other hand, with much reason, that the proviso, that "the said canals, *when completed or used*, shall be and ever remain public highways," marks the beginning of the time when the obligation was intended to operate — that is, if the canals were completed, or without being completed, were so far completed as to be capable of use, and were *used*, the obligation to maintain them in perpetuity attached. Whatever be the proper interpretation of these words, and they are by no means free from ambiguity, the dominant idea of the proviso was evidently to compel the State to maintain the canals as *public* highways, and to allow the Government free use of them "for any property of the United States, or persons in their service passing along the same." Whether the canals should be maintained forever as such, or should give place to more modern methods of transportation, was a matter of much less moment to the United States than to the State. The General Government was only interested in securing their use for the public, and the free transportation of its own servants and property. The object of the act was to facilitate and encourage public improve-

ments, but not to stand in the way of the adoption of more perfect methods of transportation which might thereafter be discovered. Had the question of internal improvements arisen ten or fifteen years later, when railways began to be constructed, it is quite improbable that the State would have embarked upon this system of canals, or that Congress would have aided it in the enterprise. Waiving the question whether the State could have abandoned the lands upon which these canals were built as public highways, we think it entirely clear that Congress could not have intended to tie the State down to a particular method of using them, when subsequent experience has pointed out a much more practicable method, which has supplanted nearly all the canals then in use. There was no undertaking to keep up the canals for all time, and we think the proper construction of the proviso is that the Government should be entitled to the free use of the canals so long as, and no longer than, they were maintained as public highways, and that the act of 1894, leasing these lands to the defendant for an analogous purpose, does no violence to the contract clause of the Constitution.

Were the question one of doubt, we should hesitate long before refusing to defer to the many opinions of the Supreme Court of Ohio, through several changes in its personnel, holding it to be within the power of the State to abandon the canal for other public purposes, and that such abandonment gave no right of action to private parties incidentally affected or damnified by it, *Hubbard* v. *City of Toledo*, 21 Ohio St. 379; *Little Miami Elevator Co.* v. *Cincinnati*, 30 Ohio St. 629; *Fox* v. *Cincinnati*, 33 Ohio St. 492, affirmed by this court, 104 U. S. 783; *Hatch* v. *Railroad Co.*, 18 Ohio St. 92; *Malone* v. *City of Toledo*, 28 Ohio St. 643; *State* v. *Board of Public Works*, 42 Ohio St. 607; *Pennsylvania & Ohio Canal Co.* v. *Commissioners*, 27 Ohio St. 14; *McComb* v. *Stewart*, 40 Ohio State, 647; *State* v. *Snook*, 53 Ohio State, 531; but the State of Ohio does not stand alone in affirming this principle. *People* v. *Kerr*, 27 N. Y. 188; *Lexington &c. Railroad* v. *Applegate*, 8 Dana, 289; *West* v. *Bancroft*, 32 Vermont, 367; *Haldeman* v. *Pennsylvania Central Railroad*, 50 Penn. St. 425; *Chase* v. *Sutton Mfg. Co.*, 4 Cush. 152.

In addition to this, however, the plaintiff stands in no position to take advantage of a default of the State in this particular. He was not a party to the contract between the state and the Federal Government; his rights were entirely subsidiary to those of the Government; and if the latter chose to acquiesce in the abandonment of the canals, as it seems to have done, he has no right to complain. He can only sustain this bill upon the theory that his rights are equal to those of the Government, and that he can call upon the State to maintain the canal for his benefit.

The case of *Grinnell* v. *Railroad Company*, 103 U. S. 739, is pertinent in this connection. That was an action in ejectment brought by a railroad company to recover certain parcels of its land grant, upon which the defendants had settled and asserted rights under the homestead and preëmption laws of the United States. Their defence was that the company had no title, because it had lost whatever right it had to the lands by a change in the location of the road, and because locating the road as it was completed did not bring these lands within the limits of the land grant act. The court held that the lands, being within the limits of the first location, the construction of the road on the new line did not annul or defeat, without further action on the part of the United States, the title thus vested; that Congress had consented to the change without any declaration affecting the title already vested in the company by the first location, and that defendants were bound thereby. In delivering the opinion of the court, Mr. Justice Miller observed: "Another point equally fatal to the plaintiffs in error is, that the assertion of a right by the United States to the lands in controversy was wholly a matter between the Government and the railroad company, or its grantors. The legal title remains where it was placed before the act of 1864. If the Government desires to be reinvested with it, it must be done by some judicial proceeding, or by some act of the Government asserting its right. It does not lie in the mouth of every one who chooses to settle on these lands to set up a title which the Government itself can only assert by some direct proceeding. These plaintiffs had no right to stir

up a litigation which the parties interested did not desire to be started. It might be otherwise if the legal title was in the Government. Then the land would be subject to homestead or preëmption rights."

A similar case is that of *Van Wyck* v. *Knevals*, 106 U. S. 360. In that case the railroad company had filed a map of definite location, and the land department had withdrawn the odd-numbered sections appropriate thereto; but in constructing the road the company departed from the line indicated. The lands in dispute were within ten miles of the road as built and of the line delineated on the map. They were entered by Van Wyck, who received a patent for them, and Knevals, who had acquired his rights from the railroad company, filed a bill against Van Wyck seeking to charge him as trustee for the lands, and the court decreed a conveyance accordingly. The defendant attacked the right of the company to the grant, alleging that it never completed the construction of the entire road for which the grant was made; that after filing its map with the Secretary of the Interior it changed the route of the road for a part of the distance. The court held, however, that the company had constructed a portion of the proposed road, and that portion was accepted as completed in the manner required by the act of Congress; that if the whole of the proposed road had not been completed any forfeiture consequent thereon could only be asserted by the United States through judicial proceedings or through the action of Congress. "A third party cannot take upon himself to enforce conditions attached to the grant when the Government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the Government has been treated with respect to the property."

The only contract in this case was between the State of Ohio and the United States. Plaintiff was neither party nor privy to such contract. It was within the power of the Government to prosecute the State for a breach of it, or to condone such breach, if it saw fit. As it adopted the latter course and has deemed it proper to acquiesce in the abandonment of the canals and in the State turning them over to the railroad

company, it does not lie in the mouth of the plaintiff to complain. This disposes of every question called to our attention in the briefs of counsel.

The plaintiff is amply protected by the decree of the Supreme Court enjoining the railroad company from entering upon his lands until payment has been made, after proper proceedings, for the increased burden caused by the use of the lands for the railroad. If any taking of the lands consequent upon the remanding of the cause for the purpose stated should suggest ulterior questions they do not arise there, and would not be concluded by an affirmance of the decree now before us for review.

The decree appealed from is therefore

Affirmed.

VOUGHT *v.* COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY. Error to the Supreme Court of the State of Ohio. No. 92. Submitted February 26, 1900.

MR. JUSTICE BROWN delivered the opinion of the court.

This was also a petition by a land owner for damages which he avers will be caused by the abandonment of the canal. The case took the same course as the case of *Walsh*, and the same judgment was rendered. So far as the constitutional question is concerned, the cases are precisely alike, and the judgment is accordingly

Affirmed.

This was submitted with No. 90, *ante*, 469, and by the same counsel.

WRIGHT *v.* COLUMBUS, HOCKING VALLEY AND ATHENS RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 91. Submitted December 13, 1899. — Decided February 26, 1900.

The Federal question set up in the assignment of errors is precisely the same as the one set up in No. 90, *ante*, 469, and No. 92, *ante*, 481, and being the only one called to the attention of the court by counsel, those cases are followed in this.

Statement of the Case.

THIS was also a petition in the same court to enjoin the railroad company from entering upon or taking possession of the canal property and constructing a railroad thereon, but in certain particulars differs from the case already considered.

Plaintiff averred that he is the owner in fee simple of a certain tract of land in the county of Hocking, through and along which said canal passes; that he is also the owner of a mill located on said land on the south side of the canal, which is now and has been for many years past operated by water power supplied by the canal; that such mill was originally constructed before the location and construction of the Hocking Canal, and was run and operated by water power from the Hocking River until the canal was constructed, when it became necessary to appropriate the Hocking River and the water power which had been used to supply his mill for the purposes of the canal; that at that time the land and the mill were owned by one Worthington, who entered into a contract with the State, by which the latter agreed to enlarge and forever maintain the dam across the Hocking River above the grist mill, in order to afford an ample supply of water, in consideration of his granting to the State the right to construct the canal through his lands; that the canal was constructed and the dam built in pursuance of such contract, and that all the water power necessary to operate the mill has been supplied from the said canal and the Hocking River up to the present time; that the plaintiff is the present owner of the land by deeds from Worthington, and that the grist mill has been supplied by such power from the Hocking River and the canal from the date of the construction of the canal, a period of fifty-seven years; that, relying upon such contract, he has made improvements and repairs upon said mill, put the same in excellent condition, and is doing a large and profitable business; that, if the defendant is permitted to enter upon the canal and construct its railroad, the water power will be cut off and destroyed, and the property rendered of little value; that he is also the owner of other lands on both sides of the canal for a long distance, to the amount of

a thousand acres, and that the construction of the railroad will place increased burdens upon his lands, and cut off and destroy his access to parts of them through the highways, and that he will be deprived of watering privileges for his stock.

A general demurrer was filed to this petition, which was sustained by the court and the petition dismissed. Plaintiff appealed to the Circuit Court, which also sustained the demurrer and dismissed the petition. Whereupon plaintiff appealed the case to the Supreme Court of the State, which affirmed the judgment of the Circuit Court, whereupon plaintiff sued out a writ of error from this court.

Mr. J. B. Foraker, *Mr. T. E. Powell* and *Mr. D. J. Ryan* for plaintiffs in error.

Mr. D. L. Sleeper, *Mr. C. H. Grosvenor* and *Mr. John J. Stoddart* for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

Plaintiff insisted before the Supreme Court that he made the improvements on his mill with reference to the contract between the State and the Federal Government, but the Supreme Court was of opinion that he had no legal right to make investments on the faith of a contract between others to which he was not a party or privy, and insist for that reason the contract should be observed by either of the parties; that, so far as related to the contract between Worthington and the State, his remedy would be in damages for breach of the contract, and not an injunction against the company entering upon the lands purchased from the State in which he had no interest. The decree against him was therefore affirmed.

The Federal question set up in the assignment of errors was precisely the same as in the other cases, and the issues which arise from such assignments are the only ones called to our attention by counsel. The judgment of the Supreme Court is therefore

Affirmed.